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No. 99-____

IN THE

Supreme Court of the United States

BRUCE G. MURPHY,

Petitioner,

v.

JEFFREY H. BECK,
as Successor Agent for Southeast Bank, N.A.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal common-law *D'Oench, Duhme* doctrine, created and expanded by *D'Oench, Duhme & Co., Inc.* v. *FDIC*, 315 U.S. 447 (1942), and its progeny, generally provides federal banking insurers, receivers, and their successors-in-interest added protections against unrecorded agreements that might form the basis of a claim or defense relating to federally insured banks that have come under the control of federal agents. There is a broad and well-recognized circuit split over whether this federal common-law doctrine is viable in light of this Court's decisions in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), and *Atherton* v. *FDIC*, 519 U.S. 213 (1997).

The question presented in this case is:

Whether the federal common-law *D'Oench, Duhme* doctrine constitutes a valid bar to petitioner's claims?

PARTIES TO THE PROCEEDINGS BELOW

The plaintiff-appellant below, and petitioner in this court, is Bruce G. Murphy.

The defendant-appellee in the Southern District of Florida and in the Eleventh Circuit, and respondent in this Court, is Jeffrey H. Beck, as Successor Agent for Southeast Bank, N.A.

In the District Court for the District of Columbia, the D.C. Circuit, and the Southern District of Florida prior to the substitution of Beck, the defendant-appellee was the Federal Deposit Insurance Corporation ("FDIC"), as receiver for Southeast Bank, N.A. The FDIC is no longer a party to this case and is not a respondent in this Court.

TABLE OF CONTENTS

Pages

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS BELOW ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
PETITION FOR WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 2
STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 7
I. THIS CASE PRESENTS A CONFLICT AMONG SIX CIRCUITS OVER THE VITALITY OF THE *D'OENCH, DUHME* DOCTRINE. 8
II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *O'MELVENY* AND *ATHERTON*. 9
III. THE QUESTION PRESENTED BY THIS CASE HAS SUBSTANTIAL CONTINUING IMPORTANCE. 11
IV. THE JUDGMENT BELOW RESULTS IN THE NON-UNIFORM APPLICATION OF FEDERAL LAW. 16
CONCLUSION 17

TABLE OF AUTHORITIES

Pages

Cases

AAI Recoveries, Inc. v. *Pijuan*, 13 F. Supp.2d 448 (S.D.N.Y. 1998) 13

Alaska Southern Partners v. *Prosser*, 972 P.2d 161 (Alaska 1999) 15

Atherton v. *FDIC*, 519 U.S. 213 (1997) ..... i, 10

Aurora Shores Homeowners Ass'n, Inc. v. *FDIC*, 2 F. Supp.2d 975 (N.D. Ohio 1998) 15

Beal Bank, SSB v. *Pittorino*, 177 F.3d 65 (CA1 1999) 13

Bolduc v. *Beal Bank, SSB*, 167 F.3d 667 (CA1 1999) 13

Booker v. *Sarasota, Inc.*, 707 So.2d 886 (Fla. Ct. App. 1st Dist. 1998) 14

Coker v. *Cramer Fin. Group, Inc.*, 992 S.W.2d 586 (Tex. App.-Texarkana 1999) 14

D'Oench, Duhme & Co., Inc. v. *FDIC*, 315 U.S. 447 (1942) ..... i, 4

DiVall Insured Income Fund Ltd. Partnership v. *Boatmen's First Nat'l Bank of Kansas City*, 69 F.3d 1398 (CA8 1995) 8

Diversified Fin. Sys., Inc. v. *Miner*, 713 N.E.2d 293 (Ind. Ct. App. 1999) 14

FDIC v. *Deglau*, 207 F.3d 153 (CA3 2000) 8, 13, 15

FDIC v. *Frates*, 44 F. Supp.2d 1176 (N.D. Okla. 1999) 14

FDIC v. *Houde*, 90 F.3d 600 (CA1 1996) 8

FDIC v. *Noel*, 177 F.3d 911 (CA10 1999), *cert. denied*, -- U.S. --, 120 S. Ct. 935 (2000) 14

First Union Nat'l Bank of Florida v. *Hall*, 123 F.3d 1374 (CA11 1997), *cert. dismissed*, 523 U.S. 1135 (1998) 13

In re Boone (Boone v. *FDIC)*, 235 B.R. 828 (D.S.C. Bankr. 1998) 15

Kessler v. *National Enters., Inc.*, 165 F.3d 596 (CA8 1999) 8, 14

Ledo Fin. Corp. v. *Summers*, 122 F.3d 825 (CA9 1997) 8

Milwaukee v. *Illinois*, 451 U.S. 304 (1981) 11

Motorcity of Jacksonville, Ltd. v. *Southeast Bank N.A.*, ("*Motorcity I*"), 83 F.3d 1317 (CA11 1996) (*en banc*), *vacated and remanded sub nom. Hess* v. *FDIC*, 519 U.S. 1087 (1997), *reinstated*, 120 F.3d 1140 (CA11 1997) (*en banc*), *cert. denied sub nom. Hess* v. *FDIC*, 523 U.S. 1093 (1998) 6, 7

Motorcity of Jacksonville, Ltd. v. *Southeast Bank N.A.*, ("*Motorcity II*"), 120 F.3d 1140 (CA11 1997) (*en banc*), *cert. denied*, *Hess* v. *FDIC*, 523 U.S. 1093 (1998) 6, 7

Murphy v. *FDIC*, 208 F.3d 959 (CA11 2000) ("*Murphy II*") 2

Murphy v. *FDIC*, 61 F.3d 34 (CADC 1995) ("*Murphy I*") 2

Murphy v. *FDIC*, 829 F. Supp. 3 (D.D.C. 1993), *rev'd*, 61 F.3d 34 (CADC 1995) 1

National Enters., Inc. v. *Barnes*, 201 F.3d 331 (CA4 2000) 9, 14

National Enters., Inc. v. *First Western Fin. Corp.*, 166 F.3d 348, 1998 WL 852526 (CA10 1998) (unpub.) (table; text in Westlaw) 13

O'Melveny & Myers v. *FDIC*, 512 U.S. 79 (1994) ... i, 4, 9, 10

OCI Mortg. Corp. v. *Marchese*, 745 A.2d 819 (Conn. App. Ct. 2000) 14

Rankin v. *Toberoff*, 1998 WL 370305 (S.D.N.Y. 1998) (unpub.) 13

Remington Invs., Inc. v. *Berg Prod. Design, Inc.*, 172 F.3d 876, 1999 WL 132267 (CA9 1999) (unpub.) (table; text in Westlaw) 13

RTC Mortg. Trust 1994-S2 v. *Shlens*, 72 Cal. Rptr.2d 581 (Cal. Ct. App. 2d Dist.), *rev. denied* (1998) 14

State Street Capital Corp. v. *Gibson Tile, Inc.*, 1998 WL 907027 (N.D. Tex. 1998) (unpub.) 13

UMLIC-Nine Corp. v. *Lipan Springs Dev. Corp.*, 168 F.3d 1173 (CA10), *cert. denied*, -- U.S. --, 120 S. Ct. 499 (1999) 14, 15

Young v. *FDIC*, 103 F.3d 1180 (CA4), *cert. denied*, 522 U.S. 928 (1997) 9, 14

Statutes

12 U.S.C. § 1821(d)(9) 2, 5, 9

12 U.S.C. § 1823(e) 2, 4, 15

28 U.S.C. § 1254 2

Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub.L. No. 101-73, 103 Stat. 183 (Aug. 9, 1989) 2

Other Authorities

Brief for the FDIC in Opposition, *Hess* v. *FDIC*, No. 97-1025 (*cert. denied*, 523 U.S. 1093 (1998)) 12, 14

Brief for the FDIC in Opposition, *Noel* v. *FDIC*, No. 99-655 (*cert. denied*, -- U.S. --, 120 S. Ct. 935 (2000)) 11

Brief of the United States, *Balar* v. *United States*, No. 98-1667 (*cert. granted* -- U.S. --, 120 S. Ct. 10 (1999)) 12

Policy Statement Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver or Corporate Liquidator, Against Unrecorded Agreements or Arrangements of a Depository Institution Prior to Receivership, 62 Fed. Reg. 5984 (1997) 12

Reply of Petitioner, *Central Green Co.* v. *United States*, No. 99-859 (*cert. granted* -- U.S. --, 120 S. Ct. 1416 (2000)) 12

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PETITION FOR WRIT OF CERTIORARI

Petitioner Bruce G. Murphy respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

This case began in the District Court for the District of Columbia. It was appealed to the D.C. Circuit, remanded to the district court, transferred to the Southern District of Florida, and eventually appealed to the Eleventh Circuit. This Petition seeks review of the decision of the Eleventh Circuit.

The District Court for the District of Columbia's opinion and order granting summary judgment to then-defendant FDIC is published as *Murphy* v. *FDIC*, 829 F. Supp. 3 (D.D.C. 1993), and is reproduced as Appendix B (pages B1-

B11). The D.C. Circuit's decision reversing the district court is published as *Murphy* v. *FDIC*, 61 F.3d 34 (CADC 1995) ("*Murphy I*"), and is reproduced as Appendix C (pages C1-C14). On remand, the D.C. District Court transferred the case to the Southern District of Florida. The transfer order is unpublished and is reproduced as Appendix D (pages D1-D2). In May of 1998, Respondent Jeffrey H. Beck, as Successor Agent for Southeast Bank, N.A. ("Southeast Bank") was substituted as party defendant for the FDIC as receiver for Southeast Bank, N.A. The substitution order is unpublished and is reproduced as Appendix E (page E1). The District Court for the Southern District of Florida's opinion and order dismissing the complaint is unpublished and is reproduced as Appendix F (pages F1-F6). The Eleventh Circuit's decision affirming the district court is published as *Murphy* v. *FDIC,* 208 F.3d 959 (CA11 2000) ("*Murphy II*"), and is reproduced as Appendix A (pages A1-A18).

JURISDICTION

The Eleventh Circuit entered its judgment on April 7, 2000. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal common-law *D'Oench, Duhme* doctrine has been partially codified by 12 U.S.C. § 1823(e), as amended, and 12 U.S.C. § 1821(d)(9).[1] These provisions are reproduced as Appendix G (pages G1-G2) and Appendix H (page H1), respectively.

[1] Section 1823(e) was amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub.L. No. 101-73, 103 Stat. 183 (Aug. 9, 1989).

STATEMENT OF THE CASE[2]

On August 18, 1989, petitioner Murphy invested over $500,000 in Orchard Island Associates Limited Partnership ("Orchard") as part of a development project for a golf and beach club in Florida. Over a period of several years extending before and after this investment, Southeast Bank lent Orchard approximately $50 million for the project. Throughout this period Southeast Bank exercised extensive control and direction over the project making Southeast Bank a *de facto* joint venturer with Orchard. As a result of various wrongful activities by Southeast Bank and Orchard, Orchard eventually defaulted on its loans and Southeast Bank foreclosed on the property. In 1991, Southeast Bank was declared insolvent and placed into FDIC receivership.

In 1992, Murphy filed suit in the District Court for the District of Columbia against the FDIC as receiver for Southeast Bank. The complaint alleged that Southeast Bank's actions as a joint venturer with Orchid caused the loss of Murphy's investment. The complaint set forth claims for breach of fiduciary duty, breach of contract, accounting deficiencies, fraud, negligent misrepresentation and securities violations.

The FDIC moved to dismiss the complaint, arguing that Murphy's claims were barred by the federal common-law *D'Oench, Duhme* doctrine. The *D'Oench, Duhme* doctrine originally only barred defenses to collection actions based upon secret side-agreements that contradicted loan documents or similar bank records concerning bank assets. Over time, however, the doctrine has expanded into a bar against all manner of claims or defenses against the FDIC or its successors that are based upon facts or agreements not memorialized in a bank's official records. In this case, the FDIC, as re-

[2] Unless otherwise noted, the facts are taken from the Eleventh Circuit's opinion, attached as Appendix A, which are in turn taken from the allegations of petitioner's complaint, which must be accepted as true given the procedural posture of the case. App. A4.

ceiver for Southeast Bank, asserted that *D'Oench* barred all of Murphy's claims because liability depended upon the joint misdeeds of Southeast and Orchard, but there was no written agreement in the Bank's records memorializing their collusive wrongdoing as a formal "joint venture."

On August 10, 1993, the district court treated the FDIC's motion as one for summary judgment and granted summary judgment on all counts. App. B1. The district court ruled that Murphy "cannot recover against Southeast on any theory of an alleged unwritten joint venture agreement pursuant to *D'Oench*, 315 U.S. 447 ... and 12 U.S.C. § 1823(e)." App. B4; *see also* App. B8 ("To the extent that the Plaintiff attempts to rely on an unwritten agreement to prove these securities violations claims, they are again barred by *D'Oench*."). Murphy appealed.

On August 1, 1995, the D.C. Circuit, per Judge Ginsburg for himself, Chief Judge Edwards, and then-Judge Wald, reversed. App. C2. The court held that § 1823(e) did not bar Murphy's claims and that this Court's "decision in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 ... (1994), removes the federal common law *D'Oench* doctrine as a separate bar to such claims." App. C2. As part of a detailed analysis of this Court's *O'Melveny* decision, the D.C. Circuit quoted *O'Melveny*'s statement regarding the "'extensive framework of FIRREA'" that "'[t]o create additional "federal common-law" exceptions is not to "supplement" this scheme, but to alter it.'" App. C10.

The D.C. Circuit then applied the reasoning of *O'Melveny* to the federal common-law *D'Oench* doctrine thus:

> [A]lthough the opinion for the Court does not specifically mention *D'Oench*, it does expressly include one of the *D'Oench*-like statutory provisions (§ 1821(d)(9)) in the list of special federal statutory rules of decision from which it infers that "*[i]nclusio unius, exclusio alterius*." *O'Melveny & Myers*, 512 U.S. at --, 114 S.Ct. at 2054.

> In so doing the Supreme Court, we think, necessarily decided the *D'Oench* question. To translate: the inclusion of § 1821(d)(9) in the FIRREA implies the exclusion of overlapping federal common law defenses not specifically mentioned in the statute – of which the *D'Oench* doctrine is one.

App. C10-C11. After disposing of various objections by the FDIC, the D.C. Circuit concluded that "the need for a body of federal common law under the rubric of *D'Oench* has now 'disappeared' and that the district court erred in holding that Murphy's claims are barred under *D'Oench*." App. C13.

After remand, the district court transferred the case, *sua sponte* and over Murphy's objections, to the Southern District of Florida. App. D1-D2.

On May 11, 1998, Jeffrey H. Beck, as Successor Agent for Southeast Bank, was substituted for the FDIC as the party defendant in the Southern District of Florida. App. E1.

On July 27, 1998, the Southern District of Florida granted Beck's motion to dismiss. App. F6. The district court held, *inter alia*, that Murphy's claims were barred by the *D'Oench* doctrine. App. F5. Despite this issue having already been decided in Murphy's favor in the D.C. Circuit, the Southern District of Florida reasoned that because the Eleventh Circuit, in an intervening case, had specifically disagreed with the D.C. Circuit's decision in *Murphy I*, "the *D'Oench* doctrine is still valid in this circuit ... [and] prevents Murphy from stating a valid claim." App. F6. Murphy appealed.

On April 7, 2000, the Eleventh Circuit affirmed the district court's decision based exclusively on the *D'Oench* doctrine. App. A5.[3] The Eleventh Circuit initially rejected Murphy's arguments that the D.C. Circuit's earlier decision in the

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[3] The court expressly declined to reach two other grounds given by the district court for the dismissal. App. A18 n. 8. Those other grounds, while in petitioner's view frivolous, would remain available on remand.

case should control based on either choice-of-law or law-of-the-case principles. The court noted that

> [w]e have had occasion recently to disagree with the D.C. Circuit as to the continued viability of the *D'Oench, Duhme* doctrine. ... In both *Motorcity I* and *Motorcity II* [*Motorcity of Jacksonville, Ltd.* v. *Southeast Bank N.A.*, ("*Motorcity I*"), 83 F.3d 1317 (CA11 1996) (*en banc*), *vacated and remanded sub nom. Hess* v. *FDIC*, 519 U.S. 1087 (1997), *reinstated, Motorcity of Jacksonville, Ltd.* v. *Southeast Bank N.A.*, ("*Motorcity II*"), 120 F.3d 1140 (CA11 1997) (*en banc*), *cert. denied sub nom. Hess* v. *FDIC*, 523 U.S. 1093 (1998)], we expressly disagreed with the D.C. Circuit's rejection of the doctrine. *See* ... *Motorcity II*, 120 F.3d at 1141-44 (noting the circuit split between the D.C. and Eighth Circuits, which have held that the FIRREA displaced the *D'Oench, Duhme* doctrine, and the Fourth Circuit, which has held that it did not, and holding that the federal common law doctrine was not preempted by the FIRREA and remained good law in this Circuit).

App. A7-A8. Thus, notwithstanding that the issue had been fully litigated in the D.C. district and circuit courts over a period of several years, the Eleventh Circuit simply wiped the slate clean and looked to its own contrary precedent regarding the viability of the *D'Oench* doctrine.[4]

In light of that precedent, the Eleventh Circuit rejected Murphy's argument that the *D'Oench* doctrine was no longer good law in light of FIRREA and this Court's decisions in *O'Melveny* and *Atherton*:

[4] The Eleventh Circuit also rejected Murphy's argument that the *D'Oench, Duhme* doctrine was inapplicable where a receivership has generated a substantial profit ($150 million) and hence the only persons (inequitably) benefiting from application of the doctrine – and from Murphy's loss – were the Bank's shareholders. App. A13-A14.

> In *Motorcity I* and *Motorcity II* we ruled decisively and *en banc* that the Supreme Court's decisions in *O'Melveny* and *Atherton* did not abrogate our prior holdings regarding the continued viability of the *D'Oench, Duhme* doctrine. We explained that both *O'Melveny* and *Atherton* dealt with the question of whether to create new federal common law in particular areas rather than with the question of whether Congress intended the FIRREA to supplant "the previously established and long-standing federal common law *D'Oench* doctrine." *Motorcity II*, 120 F.3d at 1143; *see also Motorcity I*, 83 F.3d at 1330. In *Motorcity II*, our affirmation of the *D'Oench, Duhme* doctrine in light of the FIRREA and the Supreme Court's decisions in *O'Melveny* and *Atherton* was explicit ... [quoting *Motorcity II*, 120 F.3d at 1144].

App. A16-A17. The court concluded that "the *D'Oench, Duhme* doctrine remains good law in this Circuit, and there is no sound reason not to apply the doctrine in this case. Accordingly, we affirm the district court's order dismissing Murphy's complaint." App. A18 (footnote omitted).

This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Eleventh Circuit's decision conflicts with the decision of the D.C. Circuit in this very same case, as well as with decisions of the Third, Eighth, and Ninth Circuits. The decision also conflicts with this Court's decisions in *O'Melveny & Myers* v. *FDIC* and *Atherton* v. *FDIC*. The question presented raises an important national issue affecting myriad persons and entities that do business with financial institutions eventually placed under the control of federal conservators or receivers. The divergent results reached by federal courts – both between and within cases – runs retrograde to the goal of uniform federal law and undermines the fair administration of justice.

I. THIS CASE PRESENTS A CONFLICT AMONG SIX CIRCUITS OVER THE VITALITY OF THE *D'OENCH, DUHME* DOCTRINE.

This case presents the cleanest circuit split imaginable: The decision of the Eleventh Circuit regarding the continued availability of the *D'Oench, Duhme* doctrine contradicts, and expressly rejects, the decision of the D.C. Circuit on the precise same issue in an earlier stage of this very case. *Compare* App. A12 ("We have explicitly rejected, in both *Motorcity I* and *Motorcity II*, the D.C. Circuit's prior ruling regarding the preemption of the *D'Oench, Duhme* doctrine.") *with* App. C13 ("the district court erred in holding that Murphy's claims are barred under *D'Oench*").

Several other circuits also are divided on this issue. Siding with the D.C. Circuit are the Third, Eighth, and Ninth Circuits. *See FDIC* v. *Deglau*, 207 F.3d 153, 171 (CA3 2000) ("We agree with the Eighth, Ninth and D.C. Circuits that *D'Oench* is not applicable federal common law in light of *O'Melveny* and *Atherton*."); *DiVall Insured Income Fund Ltd. Partnership* v. *Boatmen's First Nat'l Bank of Kansas City*, 69 F.3d 1398, 1402 (CA8 1995) (following *Murphy I*'s reasoning and holding that the *D'Oench* doctrine has been preempted); *Ledo Fin. Corp.* v. *Summers*, 122 F.3d 825, 828-29 (CA9 1997) (holding, in light of *O'Melveny* and *Atherton*, that *D'Oench* no longer applies, at a minimum, to the FDIC-as-receiver); *see also Kessler* v. *National Enters., Inc.*, 165 F.3d 596, 598 (CA8 1999) (post-*Atherton* rejection of *D'Oench*, citing *Divall*); *cf. FDIC* v. *Houde*, 90 F.3d 600, 605 n. 5 (CA1 1996) ("A circuit split has arisen as to whether the [*D'Oench*] doctrine is still valid after *O'Melveny & Myers*, *supra*. *Compare* [*DiVall* and *Murphy I* with *Motorcity I* (CA11)]. This court has not yet expressed an opinion as to the effect of *O'Melveny & Myers* on the doctrine.").

Siding with the Eleventh Circuit in favor of a continuing *D'Oench* doctrine is the Fourth Circuit. *Young* v. *FDIC*, 103 F.3d 1180, 1187 (CA4) ("Section 1823(e) does not, however, preempt the *D'Oench* doctrine." (citing *Motorcity I*)), *cert. denied*, 522 U.S. 928 (1997); *see also National Enters., Inc.* v. *Barnes*, 201 F.3d 331, 333 & n. 4 (CA4 2000) (post-*Atherton* confirmation of *D'Oench*, citing *Young*).

This broad split has persisted for years, both sides have recognized the conflict, the Eleventh Circuit has held fast even after a GVR by this Court, and there is no credible possibility that the split will resolve absent the direct intervention of this Court. Certiorari should therefore be granted.

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *O'MELVENY* AND *ATHERTON*.

In addition to conflicting with the decisions of four other circuits, the Eleventh Circuit's decision conflicts with the decisions of this Court. In *O'Melveny & Myers*, this Court unanimously rejected the FDIC's attempt to rely upon federal common law to bar an affirmative defense to a negligence and breach-of-fiduciary-duty suit it brought as receiver for a failed bank. 512 U.S. at 83. This Court held that not only was there no general federal common law, but also that "those provisions of FIRREA which specifically create special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver," including, specifically and notably, § 1821(d)(9), "demolished" the argument that FIRREA demonstrated a "high federal interest" sufficient to justify use of federal common law. 512 U.S. at 86. The rights expressly granted to the FDIC-as-receiver, this Court ruled, can be neither "supplemented [nor] modified by federal common law.... *Inclusio unius, exclusio alterius*." *Id.* Referring to the "extensive framework of FIRREA," this Court stated that "[t]o create additional 'federal common-law' exceptions is not to 'supplement' this scheme, but to alter it." *Id.* at 87. While not addressing *D'Oench* by name, the use of § 1821(d)(9) as the basis for its application of the "*inclusio unius, exclusio*

alterius" principle more than covers that ground.[5] The decision in *O'Melveny*, fairly read, thus requires a contrary decision to that reached by the Eleventh Circuit in this case.

Two years after *O'Melveny*, this Court decided *Atherton*, which confirms that the federal common-law *D'Oench* doctrine is not viable. In *Atherton*, this Court held that only federal statutory requirements and compatible state law set the standard of care for officers and directors of a federally chartered savings association in a suit by federal receivers. 519 U.S. at 216. Among the many points of interest in *Atherton*, the Court held that even if there were no federal statute directly addressing the issue, federal common law did not provide the standard of care. *Id.* at 217-18. In disposing of various arguments proffered by the FDIC in favor of a federal common-law rule, the Court also noted the limited federal interest at stake when "the FDIC is acting only as receiver of a failed institution; it is not pursuing the interest of the Federal Government as a bank insurer." *Id.* at 225. Finally, and of particular importance given the Eleventh Circuit's claim that *O'Melveny* and *Atherton* only apply to the creation of "new" federal common law rather than to the existence of "old" federal common law, App. A16-17, the Court in *Atherton* characterized the rule it rejected as being "a pre-existing judge-made federal common-law standard." *Id.* Indeed, the Court recognized that federal courts had been applying and interpreting the asserted federal common-law standard for over 100 years, *id.* at 220, yet did not hesitate in repudiating the validity of that standard.[6]

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[5] And, as the D.C. Circuit has noted in *Murphy I*, this "Court was specifically advised by both sides on brief and at oral argument that resolution of the issue before it could also affect the *D'Oench* doctrine." App. C10.

[6] Furthermore, while *O'Melveny* itself may have been addressed to a "new" rule, the cases relied upon by *O'Melveny*, 512 U.S. at 85, addressed "old" rules also. Thus, in *Milwaukee* v. *Illinois*, this Court stated that "when Congress addresses a question *previously governed by a decision rested on federal common law* the need for such an unusual exercise of law-making by federal courts disappears.... [The Court's] commitment to the separation of powers is too fundamental to continue to rely on federal common law ... when Congress has addressed the problem." 451 U.S. 304, 314-15 (1981) (emphasis added).

Because the Eleventh Circuit's decision is at odds with *O'Melveny* and *Atherton*, this Court should grant certiorari in order to return the Eleventh Circuit to the correct legal path.

III. THE QUESTION PRESENTED BY THIS CASE HAS SUBSTANTIAL CONTINUING IMPORTANCE.

The *D'Oench*, *Duhme* doctrine is the subject of extensive litigation and continues to arise in a variety of contexts, as the circuit split itself indicates. Thus, from the date of the *O'Melveny* decision in 1994 through the present – a period graced with a healthy national banking system and relatively few bank failures – *D'Oench* has been cited in over 300 opinions, according to a search on Westlaw.[7] These cases will continue to arise and will continue to result in the inconsistent administration of justice due to the circuit split.

This Court has previously passed on the opportunity to resolve this circuit conflict, perhaps in the hope that the issue would resolve itself based upon *Atherton*, or perhaps in reliance upon the FDIC's claim that cases involving *D'Oench* were of limited continuing significance. *See* Br. for the FDIC in Opp. at 6-7, *Noel* v. *FDIC*, No. 99-655 (*cert. denied*, -- U.S. --, 120 S. Ct. 935 (2000)) (claiming that the FDIC will assert *D'Oench* only as to transactions preceding the August 9, 1989, enactment of FIRREA and that such transactions are of limited and declining importance); Br. for the FDIC in Opp. at 10, *Hess* v. *FDIC*, No. 97-1025 (*cert. denied*, 523

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[7] And while not every case involves a direct application of *D'Oench*, the vast majority do, and the others demonstrate the broad secondary effects of this federal common-law doctrine.

U.S. 1093 (1998)) (same).[8] But these past denials of certiorari do not undermine the basis for granting certiorari in this case because the issue has not resolved itself and because the FDIC's claim of limited significance was based upon false assumptions. Of particular importance, the FDIC failed to acknowledge that its policy regarding the assertion of the *D'Oench* doctrine cannot and does not bind the many successors to the FDIC, such as respondent in this case. Therefore, certiorari should be granted because the conflict among the circuits persists and remains of continuing importance. *Cf.* Br. of the United States, *Balar* v. *United States*, No. 98-1667, at 14 n. 3 (asserting that certiorari should be granted, despite recent denial of certiorari on same question, because the filing of a further petition demonstrated the continuing significance of the question presented) (*cert. granted* -- U.S. --, 120 S. Ct. 10 (1999)); Reply of Pet., *Central Green Co.* v. *United States*, No. 99-859, at 8-9 & n. 3 (same) (*cert. granted* -- U.S. --, 120 S. Ct. 1416 (2000)).

With all due respect to the FDIC's assertions regarding the limited importance of this issue, the circuit split over *D'Oench* remains significant as to both pre- and post-FIRREA facts. Indeed, in the over three years since the FDIC issued its Policy Statement claiming to forego the invocation of *D'Oench* as to post-FIRREA facts,[9] the issue still has arisen frequently and has continued to vex the courts.

First, the FDIC is not the only party that asserts *D'Oench* as a defense. Numerous private successors-in-interest to federal receivers continue to assert the doctrine without regard to

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[8] Although the FDIC is no longer a party to this case, we are serving a courtesy copy of this petition on the Solicitor General, and granting consent for him to file an *amicus* brief for the FDIC should he see fit.

[9] Policy Statement Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver or Corporate Liquidator, Against Unrecorded Agreements or Arrangements of a Depository Institution Prior to Receivership, 62 Fed. Reg. 5984 (1997).

whether the transactions pre-date or post-date FIRREA. This case is a perfect example. *See also, e.g.*, *Beal Bank, SSB* v. *Pittorino*, 177 F.3d 65, 67-68 (CA1 1999) (private successor-in-interest to FDIC-as-receiver asserting *D'Oench* as to post-FIRREA facts); *Bolduc* v. *Beal Bank, SSB*, 167 F.3d 667, 673 (CA1 1999) (private successor-in-interest to FDIC-as-receiver invoking *D'Oench* as to post-FIRREA facts); *National Enters., Inc.* v. *First Western Fin. Corp.*, 166 F.3d 348, 1998 WL 852526, *1-3 (CA10 1998) (unpub.) (table; text in Westlaw) (private successor-in-interest to RTC-as-receiver asserting *D'Oench* as to both pre- and post-FIRREA facts); *AAI Recoveries, Inc.* v. *Pijuan*, 13 F. Supp.2d 448, 450-51 (S.D.N.Y. 1998) (successor-in-interest to FDIC-as-receiver asserting *D'Oench* regarding post-FIRREA facts); *State Street Capital Corp.* v. *Gibson Tile, Inc.*, 1998 WL 907027 (N.D. Tex. 1998) (unpub.) (successor-in-interest to RTC-as-receiver asserting *D'Oench* as to post-FIRREA facts); *cf. Remington Invs., Inc.* v. *Berg Prod. Design, Inc.*, 172 F.3d 876, 1999 WL 132267, *1 (CA9 1999) (unpub.) (table; text in Westlaw) (lease guarantor asserting *D'Oench against* successor-in-interest to FDIC-as-receiver as to undated facts); *First Union Nat'l Bank of Fla.* v. *Hall*, 123 F.3d 1374, 1376 (CA11 1997) (private successor-in-interest to FDIC-as-receiver asserting *D'Oench* as to facts of unspecified date), *cert. dismissed*, 523 U.S. 1135 (1998); *Rankin* v. *Toberoff*, 1998 WL 370305, *5 (S.D.N.Y. 1998) (unpub.) (successor-in-interest to FDIC-corporate invoking *D'Oench* as to pre- and post-FIRREA facts). Such successors-in-interest to the FDIC – including purchasers of assets from the FDIC and successor agents such as the respondent in this case – will undoubtedly continue to assert *D'Oench* as long as it remains available, regardless of any internal FDIC policies.

Second, *both* the FDIC and various private parties regularly continue to invoke or to defend *D'Oench* as to pre-FIRREA facts. *See, e.g.*, *Deglau*, 207 F.3d at 159 n. 2, 171 (CA3 2000) (FDIC-as-receiver and/or private successor-in-

interest asserted *D'Oench* as to pre-FIRREA facts); *Barnes*, 201 F.3d at 332-33 (CA4 2000) (private successor-in-interest to RTC-as-conservator asserting *D'Oench* regarding pre-FIRREA facts); *FDIC* v. *Noel*, 177 F.3d 911, 917-18 (CA10 1999) (applying *D'Oench* to pre-1989 facts), *cert. denied*, -- U.S. --, 120 S. Ct. 935 (2000); *UMLIC-Nine Corp.* v. *Lipan Springs Dev. Corp.*, 168 F.3d 1173, 1179 (CA10) (private successor-in-interest to RTC-as-receiver invoking *D'Oench* as to pre-FIRREA facts), *cert. denied*, -- U.S. --, 120 S. Ct. 499 (1999); *Kessler*, 165 F.3d at 598 (CA8 1999) (private successor-in-interest to RTC-as-receiver invoking *D'Oench* as to pre-FIRREA agreements); *Young* v. *FDIC*, 103 F.3d at 1187-89 (CA4 1997) (FDIC asserting *D'Oench* as to pre-FIRREA facts); *FDIC* v. *Frates*, 44 F. Supp.2d 1176, 1220-21 (N.D. Okla. 1999) (FDIC asserting *D'Oench* as to pre-FIRREA facts); *OCI Mortg. Corp.* v. *Marchese*, 745 A.2d 819, 821-22 (Conn. App. Ct. 2000) (successor-in-interest to RTC-as-receiver asserting *D'Oench* as to pre-FIRREA facts); *Diversified Fin. Sys., Inc.* v. *Miner*, 713 N.E.2d 293, 299 (Ind. Ct. App. 1999) (successor in interest to FDIC-as-receiver invoking *D'Oench* and as to pre-FIRREA facts); *Coker* v. *Cramer Fin. Group, Inc.*, 992 S.W.2d 586, 590 (Tex. App.-Texarkana 1999) (successor-in-interest to FDIC-as-receiver invoking *D'Oench* as to pre-FIRREA facts); *RTC Mortg. Trust 1994-S2* v. *Shlens*, 72 Cal. Rptr.2d 581, 592 (Cal. Ct. App. 2d Dist.), *rev. denied* (1998) (successor-in-interest to RTC-as-receiver invoking *D'Oench* as to pre-FIRREA facts); *Booker* v. *Sarasota, Inc.*, 707 So.2d 886, 887-88 (Fla. Ct. App. 1st Dist. 1998) (successor-in-interest to RTC/FDIC-as-receiver invoking *D'Oench* as to facts of uncertain, but likely pre-FIRREA, date); *see also* Br. for the FDIC in Opp. at 8, *Hess* v. *FDIC*, No. 97-1025 (cert. denied, 523 U.S. 1093 (1998)) ("Agreements made before [the enactment of FIRREA] ... are subject to pre-FIRREA law, including the

federal common law then well established under *D'Oench*.").[10]

Third, the FDIC has never conceded that FIRREA displaces *D'Oench* even as to post-FIRREA agreements. Its Policy Statement supposedly eschewing *D'Oench* in such contexts is just that – a policy statement, not a regulation – and thus, for all practical purposes, is legally meaningless. And there is at least some reason to doubt that the FDIC abides by that policy in any consistent fashion. *See, e.g., In re Boone (Boone* v. *FDIC)*, 235 B.R. 828, 834-35 (D.S.C. Bankr. 1998) (FDIC apparently asserting *D'Oench* as defense regarding post-1989 facts).[11]

Because courts continue to address numerous assertions of the *D'Oench* doctrine as to both pre- and post-FIRREA

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[10] Contrary to the FDIC's earlier claims, such cases are quite numerous and will continue to arise for many years to come. Given the long statute of limitations – six years – and the government's habit of appointing successive federal receiverships, there are likely numerous cases involving pre-1989 facts that have yet to be brought, much less that have resulted in a decision. *Cf. UMLIC-Nine Corp.*, 168 F.3d at 1179 & n. 5 (CA10 1999) (1986 Note, 1988 default, 1988 Receivership and transfer of assets, 1991 receivership of transferee, creation of dummy institution, transfer of assets and appointment of conservator for transferee, 1992 appointment of receiver for transferee, 1995 transfer of Note to private party; statute of limitations on 1988 default thus runs at least to 1997 – six years after appointment of the penultimate receiver, and maybe longer).

[11] Casting further doubt on the significance of the FDIC's February 1997 Policy Statement is the fact that the FDIC apparently continues to assert defenses based on amended § 1823(e) in cases involving *pre*-FIRREA transactions. *See Deglau*, 207 F.3d at 159 n. 2, 170-71 (CA3 2000) (applying § 1823(e) in favor of FDIC-as-receiver and its eventual successor-in-interest in case involving pre-FIRREA facts); *Aurora Shores Homeowners Ass'n, Inc.* v. *FDIC*, 2 F. Supp.2d 975, 977-79 (N.D. Ohio 1998) (FDIC-as-receiver invoking § 1823(e) as to pre-1989 facts); *cf. Alaska Southern Partners* v. *Prosser*, 972 P.2d 161, 164-65 (Alaska 1999) (successor-in-interest to FDIC-as-receiver invoking § 1823(e) as to pre-FIRREA facts).

facts, the issue continues to be of national significance and in great need of this Court's attention.

IV. THE JUDGMENT BELOW RESULTS IN THE NON-UNIFORM APPLICATION OF FEDERAL LAW.

In addition to the pressing general need to resolve a continuing and expanding split, this case itself presents a compelling vehicle in which to address the question presented. As an initial matter, the fact that the same plaintiff, on identical facts, both won and then lost on appeal in two different federal courts on the same question of law in the same case highlights the confusion among the circuits and the need for a uniform law on this subject. It also highlights the danger of forum shopping – primarily to avoid those circuits in which the *D'Oench* doctrine has been rejected – and the danger that inconsistent results will occur due solely to choice of forum.

Second, the procedural conduct of this case clouds the credibility of the federal courts insofar as it appears that a successful plaintiff was deprived of his efforts by the manipulations of the government and the judiciary. Thus, without purporting to know the mind of the district judge, it certainly has a questionable appearance when a judge who has just been reversed transfers a case, *sua sponte*, to a circuit in which the law is more hospitable to his original opinion. This appearance is exacerbated by the fact that the transfer was for the purported reason of the convenience of the parties and witnesses and the better application of state law, but upon reaching the transferee circuit, the case was fully (and predictably) resolved based on controlling federal precedent on a motion to dismiss. The entire predicate for the transfer thus proved utterly hollow and the only consequence was that the transferee district's original views were effectively reinstated in a more favorable forum as a result of the transfer.

Third, the entire notion of having a transferee court apply its own law is predicated upon the supposed uniformity of

federal law. But such uniformity can come only from this Court in cases where the transferee and the transferor court themselves split on a dispositive question of law. In order to make any sense of this federal choice of law rule, this Court needs to impose the presumed uniformity in cases such as this one. Otherwise, the justifications offered by the Eleventh Circuit for applying its own law to the transferred case are just empty platitudes. The need for Supreme Court-imposed uniformity is even greater given the Eleventh Circuit's refusal to apply the law-of-the-case doctrine on the sole ground that it disagreed with its sister circuit and hence refused to defer to its ruling despite the parties already having fully litigated the issue between them.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: July 5, 2000.

APPENDICES

APPENDIX A

208 F.3d 959

Bruce G. MURPHY, Plaintiff-Appellant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for Southeast Bank, N.A.; Jeffrey H. Beck, Defendants-Appellees.

No. 98-5292.

United States Court of Appeals,

Eleventh Circuit.

April 7, 2000.

John F. Bloss, Clark & Wharton, Greensboro, NC, for Plaintiff- Appellant.

Elliot H. Scherker, Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Miami, FL, for Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before BIRCH and MARCUS, Circuit Judges, and ALAIMO*, Senior District Judge.

MARCUS, Circuit Judge:

Plaintiff-Appellant Bruce G. Murphy ("Murphy") appeals the district court's order dismissing his amended complaint against Defendant Jeffrey Beck, as Successor Agent for the Federal Deposit Insurance Company, ("FDIC"). Among other things, the district court held that Murphy's claims

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* Honorable Anthony A. Alaimo, Senior U.S. District Judge for the Southern District of Georgia, sitting by designation.

against the FDIC were barred by the federal common law *D'Oench, Duhme* doctrine first expounded by the Supreme Court in *D'Oench, Duhme & Co., Inc.* v. *FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942). Because acceptance of the *D'Oench, Duhme* doctrine is well-settled in this Circuit, and because we can discern no sound reason for not applying the doctrine in this case, we affirm the district court's order dismissing Murphy's complaint.

I.

The facts underlying this case are straightforward, but the procedural history of the case is both unusual and important. In June 1989, Murphy received a letter from Robert H. Haines, III, a general partner in Orchid Island Associates Limited Partnership ("Orchid"), soliciting Murphy's investment in Orchid's development of the Orchid Island Golf and Beach Club Project (the "Project") located in Indian County, Florida. The letter projected a 6.1 multiple return on investments. Soon thereafter, on August 18, 1989, Murphy invested $515,672.37 in a limited partnership interest in Orchid.

Southeast Bank provided several loans for the Project from the fall of 1988 until the beginning of 1991. These loans totaled approximately $50 million. Orchid eventually defaulted on its loans and Southeast foreclosed on the property. Southeast itself was declared insolvent on September 19, 1991 and placed in FDIC receivership.

On August 20, 1992, Murphy filed suit in the United States District Court for the District of Columbia against the FDIC, as receiver for Southeast, alleging that Southeast asserted extensive control over the Project and that Southeast knew about and participated in the fraudulent activities of Orchid's principals. According to the complaint, Murphy was induced to invest by a solicitation letter from Orchid which falsely represented that projections by Arthur Anderson & Co. reflected a "6.1 multiple return on [ ][his] investment." Murphy claimed that Southeast acted in concert with Orchid

in making decisions pertaining to the Orchid development, and that these decisions were separate and apart from Southeast's role as a mere lender to Orchid. Murphy added that Southeast's actions as a joint venturer with Orchid in the Project caused the loss of his financial investment. Accordingly, Murphy sued for breach of fiduciary duty, breach of contract, accounting deficiencies, fraud, negligent misrepresentation and securities violations.

The FDIC moved to dismiss the complaint on the grounds that Murphy's claims were barred by the federal common law doctrine of *D'Oench, Duhme*. On August 10, 1993, the district court, treating the FDIC's motion as a motion for summary judgment, granted summary judgment on all counts. The district court ruled that under the *D'Oench, Duhme* doctrine, Murphy could not assert a claim against the FDIC based on the theory that Southeast was a joint venturer with Orchid in the Project because there was no written joint venture agreement between the two. *Murphy* v. *FDIC*, 829 F. Supp. 3, 5-6 (D.D.C. 1993). In fact, the written agreements between the bank and Orchid denied such a relationship. *Id.* On appeal, the Court of Appeals for the D.C. Circuit reversed the district court's decision on all but two counts,[1] holding that the *D'Oench, Duhme* doctrine had been preempted by the Financial Institutions Reform, Recovery, and Enhancement Act

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[1] The Circuit Court affirmed the district court's grant of summary judgment in favor of the FDIC on Murphy's two procedural claims seeking 1) a declaratory judgment that the FDIC is required by statute to establish an ADR procedure, and 2) a writ of mandamus compelling that result. As for the first claim, the court held that although the Financial Institutions Reform, Recovery, and Enhancement Act of 1989 (FIRREA) did not seem to require the FDIC to establish an ADR process, the FDIC appeared to have initiated such a program and therefore Murphy's request for the court to order the FDIC to do so was moot. As for the second claim, the court held that the FIRREA gave the FDIC discretion to decide whether to refer any particular case to ADR and therefore Murphy was not entitled to an order compelling the FDIC to direct his case to ADR. *Murphy*, 61 F.3d at 40-41.

of 1989 (FIRREA) and did not, therefore, bar Murphy's claims. *See Murphy* v. *FDIC*, 61 F.3d 34, 39 (D.C. Cir. 1995) (concluding that "the inclusion of § 1821(d)(9) in the FIRREA implies the exclusion of overlapping federal common law defenses not specifically mentioned in the statute – of which the *D'Oench* doctrine is one").

After remand to the district court, the FDIC again moved to dismiss the complaint for failure to state a claim. Without ruling on the motion, the district court transferred the case to the Southern District of Florida, concluding that the Southern District of Florida was a more convenient location for the case because the Plaintiff and the majority of witnesses resided in the district and both the Project and Southeast Bank had been located there. The district court for the Southern District of Florida substituted Jeffrey H. Beck as successor agent for the FDIC and, thereafter, granted the FDIC's Motion to Dismiss. The district court offered three alternative grounds for its decision: first, loan agreements between Orchid and Southeast disclaiming the existence of a joint venture barred Murphy, as a limited partner in Orchid and therefore a party to the agreements, from asserting such a joint venture; second, even if Murphy were not a party to the agreements, he failed to prove the existence of a joint venture relationship between Orchid and Southeast; and finally, the federal common law *D'Oench, Duhme* doctrine barred Murphy's claim.

II.

We review a district court's order granting a motion to dismiss for failure to state a claim de novo. *Beck* v. *Deloitte & Touche*, 144 F.3d 732, 736 (11th Cir. 1998); *McKusick* v. *City of Melbourne*, 96 F.3d 478, 482 (11th Cir. 1996). When considering a motion to dismiss for failure to state a claim, a court must accept the allegations in the complaint as true, construing them in the light most favorable to the plaintiff. *Kirby* v. *Siegelman*, 195 F.3d 1285, 1289 (11th Cir. 1999).

On appeal, we need only consider the district court's third reason for dismissal. Plainly, the *D'Oench, Duhme* doctrine was intended "to protect [the FDIC] and the public funds which it administers against misrepresentations as to the securities or other assets [and liabilities] in the portfolios of the banks which [the FDIC] insures." *D'Oench, Duhme*, 315 U.S. at 457, 62 S. Ct. at 679, 86 L. Ed. 956. The doctrine originated more than half-a-century ago in the case of *D'Oench, Duhme & Co., Inc.* v. *FDIC* where a securities dealer who executed a demand note with a bank tried to prevent the FDIC, which had acquired the note, from enforcing it because of the dealer's separate agreement with the bank that the note would not be called for payment. The Supreme Court rejected the defense and squarely held that a secret agreement not on the bank's records could not operate as a defense against the FDIC's suit. *Id.* at 459, 62 S. Ct. at 680.[2]

The Eleventh Circuit has described the scope of the

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[2] Eight years later, Congress partially codified the holding of *D'Oench, Duhme*, as section 2(13)(e) of the Federal Deposit Insurance Act of 1950, 12 U.S.C. § 1823(e)(1). This provision, as modified by the Financial Institutions Reform, Recovery, and Enforcement Act, Pub.L. No. 101-73, currently provides:

> No agreement which tends to diminish or defeat the interest of the Corporation [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement–
>
> (A) is in writing,
>
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (D) has been, continuously, from the time of its execution, an official record of the depository institution.

D'Oench, Duhme doctrine in these terms:

> In a suit over the enforcement of an agreement originally executed between an insured depository institution and a private party, a private party may not enforce against a federal deposit insurer any obligation not specifically memorialized in a written document such that the agency would be aware of the obligation when conducting an examination of the institution's records.

Baumann v. *Savers Federal Sav. and Loan Ass'n*, 934 F.2d 1506, 1515 (11th Cir. 1991). *See also Motorcity of Jacksonville, Ltd.* v. *Southeast Bank N.A.*, ("*Motorcity I*"), 83 F.3d 1317, 1326 (11th Cir. 1996) (*en banc*), *vacated and remanded by Hess* v. *FDIC*, 519 U.S. 1087, 117 S. Ct. 760, 136 L.Ed.2d 708 (1997), *reinstated by Motorcity of Jacksonville, Ltd.* v. *Southeast Bank N.A.*, ("*Motorcity II*"), 120 F.3d 1140 (11th Cir. 1997), (*en banc*), *cert. denied*, *Hess* v. *FDIC*, 523 U.S. 1093, 118 S. Ct. 1559, 140 L.Ed.2d 791 (1998).[3] We have held that the doctrine "'applies in virtually all cases where a federal depository institution regulatory agency is confronted with an agreement not documented in the institution's records.'" *OPS Shopping Ctr., Inc.* v. *FDIC*, 992 F.2d 306, 308 (11th Cir. 1993) (quoting *Baumann*, 934 F.2d at 1510). We have also made clear that the doctrine applies when the FDIC is acting as a receiver. *See FSLIC* v. *Two Rivers Assocs., Inc.*, 880 F.2d 1267, 1274, 1276-77 (11th Cir. 1989) (holding that the federal common law *D'Oench, Duhme* doctrine protects the FSLIC and the FDIC in both receiver and corporate capacities); *Timberland Design, Inc.* v. *First Serv. Bank for Sav.*, 932 F.2d 46, 49 (1st Cir. 1991) (*per curiam*) (citing

[3] The Supreme Court granted certiorari on *Motorcity I*, vacated our judgment, and remanded the case for further consideration in light of its decision in *Atherton* v. *FDIC*, 519 U.S. 213, 117 S. Ct. 666, 136 L.Ed.2d 656 (1997). In *Motorcity II*, after considering the Supreme Court's decision in *Atherton*, we reaffirmed our previous holding in *Motorcity I* and reinstated that opinion.

cases for the proposition that "courts have consistently applied the [*D'Oench, Duhme*] doctrine to those situations where the FDIC was acting in its capacity as receiver").

Because no written agreement exists between Southeast and Orchid, if the *D'Oench, Duhme* doctrine applies in this case, it bars Murphy's claims against the FDIC which are based on his allegations that Orchid and Southeast were acting as joint venturers. Murphy argues, however, that there are four independent reasons why the *D'Oench, Duhme* doctrine should not be applied in this case: first, the choice of law doctrine requires application of D.C. Circuit law rather than Eleventh Circuit law; second, the D.C. Circuit's decision that the *D'Oench, Duhme* doctrine has been preempted by the FIRREA should be accepted as law of the case; third, the doctrine should not be applied to cases in which the receivership has generated a surplus; and finally, the doctrine is no longer valid in light of recent Supreme Court rulings. We are not persuaded by any of these arguments and address each in turn.

A.

We have had occasion recently to disagree with the D.C. Circuit as to the continued viability of the *D'Oench, Duhme* doctrine. In its consideration of this case before transfer, the D.C. Circuit held that the doctrine had been preempted by the FIRREA, and therefore could not bar Murphy's claims. *Murphy* v. *FDIC*, 61 F.3d at 38. According to the D.C. Circuit, "the Supreme Court ... necessarily decided the *D'Oench* question.... [T]he inclusion of § 1821(d)(9) in the FIRREA implies the exclusion of overlapping federal common law defenses not specifically mentioned in the statute – of which the *D'Oench* doctrine is one." *Id.* at 39. In both *Motorcity I* and *Motorcity II*, we expressly disagreed with the D.C. Circuit's rejection of the doctrine. *See Motorcity I*, 83 F.3d at 1327 (noting that "[i]n *Murphy* v. *FDIC*, 61 F.3d 34 (D.C. Cir. 1995), the D.C. Circuit recently held that the Supreme Court's reasoning in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 114

S. Ct. 2048, 129 L. Ed.2d 67 (1994), leads 'ineluctably' to the conclusion that the common law *D'Oench* doctrine has been preempted. *Id.* at 38.... We disagree ... and hold that the federal common law *D'Oench* doctrine has not been preempted by statute" (internal citations omitted)); *Motorcity II*, 120 F.3d at 1141-44 (noting the circuit split between the D.C. and Eighth Circuits, which have held that the FIRREA displaced the *D'Oench, Duhme* doctrine, and the Fourth Circuit, which has held that it did not, and holding that the federal common law doctrine was not preempted by the FIRREA and remained good law in this Circuit). In *Motorcity II* we concluded that "the analysis set forth in our prior *en banc* opinion [*Motorcity I*] reflects the most reasonable reading of Congress's intent – *i.e.*, that Congress did not intend FIRREA to displace the *D'Oench* doctrine, but rather intended to continue the harmonious, forty-year coexistence of the statute and the *D'Oench* doctrine." *Id.* at 1144.

Murphy argues nevertheless that we should apply the law of the D.C. Circuit rather than our own law to his claims because the law of the transferor court should govern in the context of transfers pursuant to 28 U.S.C. § 1404(a). Although this circuit has not addressed the question of whether a transferee court should follow its own interpretation of federal law or that of the transferor court, several other circuits have addressed the question, and all have concluded that the transferee court should apply its own interpretation of federal law. We find the reasoning of these circuits persuasive.

In *In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987), the D.C. Circuit addressed the question of what law to apply to a number of wrongful death actions that were transferred to the District of Columbia pursuant to 28 U.S.C. § 1407 for consolidated pretrial proceedings. The substantive issue before the court was whether the per-passenger damage limits set by the Warsaw Convention should be applied to limit Korean Air Lines' liability when the type size of the liability limit printed on the tickets

was smaller than the size required by the Montreal Agreement. The district court, interpreting District of Columbia law, held that the damage limits were applicable. *See In re Korean Air Lines Disaster of September 1, 1983*, 664 F. Supp. 1463 (D.D.C. 1985). This ruling was, however, contrary to precedent in the Second Circuit where several of the cases had originally been filed. *See In re Korean Air Lines Disaster*, 829 F.2d at 1172. The D.C. Circuit affirmed the district court's order squarely holding "that the district court properly adhered to its own interpretation of the Warsaw Convention/Montreal Agreement in all actions, including those transferred from district courts within the Second Circuit." *Id.* at 1173.

The court also distinguished *In re Korean Air Lines* from *Van Dusen* v. *Barrack*, 376 U.S. 612, 84 S. Ct. 805, 11 L.Ed.2d 945 (1964), in which the Supreme Court held that when a defendant in a diversity action moves for a transfer of venue under 28 U.S.C. 1404(a), the state law that would have applied in the transferor court adheres to the case. *See Van Dusen*, 376 U.S. at 637-39, 84 S. Ct. at 820. The D.C. Circuit explained that the logic behind *Van Dusen* – reflecting the need to ensure that federal and state courts uniformly apply the same state law to diversity cases regardless of where the cases are tried – does not apply to a case brought under federal law because federal law is supposed to be unitary. *In re Korean Air Lines*, 829 F.2d at 1175-76. As the Circuit Court explained:

> Our system contemplates differences between different states' laws; thus a multidistrict judge asked to apply divergent state positions on a point of law would face a coherent, if sometimes difficult, task. But it is logically inconsistent to require one judge to apply simultaneously different and conflicting interpretations of what is supposed to be a unitary federal law.

Id. at 1175-76. The court concluded that "[t]he federal courts ... owe respect to each other's efforts and should strive to

avoid conflicts, but each has an obligation to engage independently in reasoned analysis. Binding precedent for all is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit." *Id.* at 1176.

The Second, Eighth, and Ninth Circuits uniformly have agreed with the D.C. Circuit that in cases where federal law is at issue, transferee courts are obligated to follow their own interpretation of the relevant law. *See Campos* v. *Ticketmaster Corp.*, 140 F.3d 1166, 1171 n. 4 (8th Cir. 1998) (holding that the consolidated issues the court was hearing were controlled by the law of its circuit and not the law of the various circuits from which the cases were transferred); *Temporomandibular Joint (TMJ) Implant Recipients* v. *E.I. DuPont De Nemours & Co.*, 97 F.3d 1050, 1055 (8th Cir. 1996) (holding that "[w]hen analyzing questions of federal law, the transferee court should apply the law of the circuit in which it is located"); *Newton* v. *Thomason*, 22 F.3d 1455, 1460 (9th Cir. 1994) (same); *Menowitz* v. *Brown*, 991 F.2d 36, 40-41 (2d Cir. 1993) (same).[4]

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[4] The Seventh Circuit has also agreed, in *dicta*, in the factually dissimilar case of *Eckstein* v. *Balcor Film Investors*, 8 F.3d 1121 (7th Cir. 1993), with the reasoning of the D.C. Circuit. *Eckstein* involved a question of the appropriate statute of limitations for a claim of fraud arising under § 10(b) of the Securities Exchange Act of 1934. The case involved two sets of plaintiffs, both of whom filed their action before 1990. When the litigation began, federal courts throughout the country derived the periods of limitations in § 10(b) cases from state law. *See Eckstein*, 8 F.3d at 1124. However, in July 1990, the Seventh Circuit overruled its opinions that had looked to state law and held that § 13 of the Securities Act of 1933 supplied the proper statute of limitations for § 10(b) fraud claims. *See Short* v. *Belleville Shoe Manufacturing Co.*, 908 F.2d 1385 (7th Cir. 1990). In June 1991, the Supreme Court agreed with the Seventh Circuit that the federal securities laws are the proper source of the period of limitations but selected § 9(e) of the Securities Exchange Act of 1934 as the most appropriate rule. *See Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 364 n. 9, 111 S. Ct. 2773, 2782 n. 9, 115 L. Ed.2d 321 (1991). Congress responded to *Lampf* by enacting stopgap legislation

We find the reasoning of the D.C., Second, Eighth, and Ninth Circuits persuasive. Since the federal courts are all interpreting the same federal law, uniformity does not require that transferee courts defer to the law of the transferor circuit. Therefore, we conclude that the law of the Eleventh Circuit, rather than the law of the D.C. Circuit, regarding the continued viability of the *D'Oench, Duhme* doctrine, was properly applied in this case.

B.

Second, Murphy argues that even if the law of the Eleventh Circuit should, in general, be applied to cases transferred

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which provided that the proper period of limitations for cases filed on or before June 19, 1991, was the limitation period provided by the laws in the applicable jurisdiction as those law existed on June 19, 1991. *See Eckstein*, 8 F.3d at 1124 (quoting § 27A of the '34 Act, 15 U.S.C. § 78aa-1(a)). The district court in Eckstein held that under the stopgap legislation provided by § 27A, the law of the Seventh Circuit as stated in Short should control the statute of limitations imposed on both the plaintiffs who filed originally in the Seventh Circuit and those who filed originally in the Ninth Circuit. *See Majeski* v. *Balcor Entertainment Co. Ltd.*, 786 F. Supp. 1458, 1461 (E.D. Wis. 1992). On appeal, the Seventh Circuit faced the question of the proper application of § 27A to transferred cases. The Seventh Circuit agreed with the D.C. Circuit's reasoning in *In re Korean Air Lines* that a transferee court should normally use its own best judgment about the meaning of federal law when evaluating a federal question. According to the court, "A single federal law implies a national interpretation. Although courts of appeals cannot achieve this on their own, the norm is that each court of appeals considers the questions independently and reaches its own decision, without regard to the geographic location of the events giving rise to the litigation." *Eckstein*, 8 F.3d at 1126. The court concluded, however, that Congress' stopgap legislation required a different result in this case. The Seventh Circuit held that § 27A required them to apply the statute of limitations of the Seventh Circuit to the plaintiffs who filed originally in Wisconsin and the statute of limitations of the Ninth Circuit to the plaintiffs who filed originally in California as those laws existed on June 19, 1991. *Id.* at 1127-28. Unlike in *Eckstein*, there is no Congressional mandate in the present case instructing us to depart from the usual rule that a court of appeals must apply its own interpretation of federal law.

here, the previous holding of the D.C. Circuit in this case – that the *D'Oench, Duhme* doctrine has been preempted by the FIRREA – binds this Court as "law of the case." "[L]aw of the case is an amorphous concept." *Arizona* v. *California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 1391, 75 L.Ed.2d 318 (1983). The doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Id*; *see also Robinson* v. *Parrish*, 720 F.2d 1548, 1549-50 (11th Cir. 1983). The purpose of the doctrine is to bring an end to litigation by foreclosing the possibility of repeatedly litigating an issue already decided. *See Wheeler* v. *City of Pleasant Grove*, 746 F.2d 1437, 1440 (11th Cir. 1984); *United States* v. *Williams*, 728 F.2d 1402, 1406 (11th Cir. 1984); *Robinson*, 720 F.2d at 1550. The law of the case doctrine does not, however, require rigid adherence to rulings made at an earlier stage of a case in all circumstances. *See Robinson*, 720 F.2d at 1550. The doctrine "directs a court's discretion, it does not limit the tribunal's power." *Arizona*, 460 U.S. at 618, 103 S. Ct. 1382; *see also DeLong Equip. Co.* v. *Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1196 (11th Cir. 1993) (noting that the doctrine "'is not an inexorable command that rigidly binds the court to its former decisions, but rather is an expression of good sense and wise judicial practice'") (quoting *Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d 16, 19 (5th Cir. 1974)). Both the Supreme Court and this Circuit have made clear that reconsideration of a prior holding is not improper if the court is convinced that the prior decision is clearly erroneous and would work manifest injustice. *See Arizona*, 460 U.S. at 619 n. 8, 103 S. Ct. at 1391 n. 8; *Wheeler*, 746 F.2d at 1440 (citing *United States* v. *Robinson*, 690 F.2d 869, 872 (11th Cir. 1982)). Such is the case here. We have explicitly rejected, in both *Motorcity I* and *Motorcity II*, the D.C. Circuit's prior ruling regarding the preemption of the *D'Oench, Duhme* doctrine. We are not, therefore, bound by the "law of the case" doctrine to adhere to a ruling with which we have emphatically and repeatedly disagreed.

C.

Third, Murphy argues that even under current Eleventh Circuit law the *D'Oench, Duhme* doctrine should not be applied in this particular case because, Southeast, unlike the vast majority of FDIC receiverships, generated a $150 million surplus. Murphy suggests that because, under 12 U.S.C. § 1821(d)(11)(B), the bank's shareholders are allowed to divide funds remaining in a receivership pool after the creditors have been paid in full, applying the *D'Oench, Duhme* doctrine in this case would unfairly allow Southeast's shareholders to benefit from Murphy's loss. Murphy contends that allowing the bank's shareholders to divide what remains of his lost investment is contrary to notions of equity.

Murphy can point us to no case law, however, saying or even suggesting that the *D'Oench, Duhme* doctrine does not apply in cases where the receivership has generated a surplus. Rather, Murphy cites cases favoring the use of corporate assets to discharge debts before corporate stockholders are paid. *See Bankers Trust Co.* v. *Florida East Coast Ry. Co.*, 31 F. Supp. 961, 964 (S.D. Fla. 1940) (ordering preferential payment by receivers of defendant railroad of previously entered judgment awarding plaintiff damages for the wrongful death of her husband); *Hoyt* v. *Hampe*, 206 Iowa 206, 214 N.W. 718, 719 (1927) (explaining that "[t]he stockholders of a corporation are not entitled to a distribution of the assets among themselves while corporate debts remain unpaid"). Neither of these cases involve the FDIC as a party, and they do not implicate or shed light on the applicability of the *D'Oench, Duhme* doctrine in cases of surplus.[5]

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[5] The third case Murphy cites in support of his surplus argument, *First Interstate Bank of Texas, N.A.* v. *First National Bank of Jefferson*, 928 F.2d 153 (5th Cir. 1991), also does not involve the *D'Oench, Duhme* doctrine and merely underscores the inapplicability of these cases to the question at hand. In *First Interstate Bank* the court expressly states that "[t]he *D'Oench, Duhme* doctrine protects the FDIC, not a solvent bank.

As we explained in *Motorcity I*, the purpose of the *D'Oench, Duhme* doctrine is to ensure that the FDIC can rely on the records of a failed bank to determine quickly whether to engage in a purchase and assumption transaction, or whether to liquidate the failed bank and pay off insured deposits. *Motorcity I*, 83 F.3d at 1324. "Neither the FDIC nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions." *Motorcity I*, 83 F.3d at 1325. Permitting the doctrine to be overridden if a receivership generates a surplus in the future undermines the doctrine's purpose of enabling the FDIC to make informed and accurate evaluations of a failed bank's assets and liabilities at the outset of the receivership in order to determine the best way to manage the bank's losses. Indeed the rationale of *D'Oench, Duhme* – to protect the FDIC from enforcement of oral agreements against failed financial institutions – is no less compelling if the failed institution eventually generates a surplus. The exception Murphy favors would eviscerate the doctrine. We conclude, therefore, that neither precedent nor the doctrine's purpose counsel in favor of creating an exception to the application of the *D'Oench, Duhme* doctrine for cases in which a receivership generates a surplus.

D.

Finally, Murphy argues that the *D'Oench, Duhme* doctrine is no longer good law because it has been supplanted by the FIRREA. Murphy argues that the Supreme Court's decisions in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 114 S. Ct. 2048, 129 L.Ed.2d 67 (1994), and *Atherton* v. *FDIC*, 519 U.S. 213, 117 S. Ct. 666, 136 L. Ed.2d 656 (1997), require such preemption. Our Circuit has already spoken clearly on this issue rejecting precisely this claim.

In *O'Melveny & Myers*, the FDIC, as receiver of a failed

The district court correctly declined to extend the doctrine to this case in which the FDIC is not a party." *Id.*, 928 F.2d at 156.

California savings and loan (S&L), brought a malpractice lawsuit against the savings and loan's former law firm, pleading causes of action under California law for professional negligence and breach of fiduciary duty. *Id.*, 512 U.S. at 82, 114 S. Ct. at 2052. The FDIC alleged that the law firm failed to inform the S&L of the illegal acts of the S&L's controlling officers. *Id.* The law firm defended by arguing that, under California law, knowledge of the conduct of the S&L's controlling officers must be imputed to the S&L, and hence to the FDIC, which, as receiver, stood in the S&L's shoes. Id. The FDIC urged the Court to create a new federal common law rule to govern the imputation of knowledge to the FDIC. *Id.* at 83, 114 S. Ct. at 2052. The Court declined to do so. First, the Court explained that, by statute, California, rather than federal common law, governed imputation of corporate officers' knowledge to the FDIC. The Supreme Court noted that 12 U.S.C. § 1821(d)(2)(A)(i), as amended by the FIRREA, "places the FDIC in the shoes of the insolvent S&L, to work out its claims under state law except where some provision in the extensive framework of FIRREA provides otherwise." *Id.*, at 87, 114 S. Ct. at 2054. Moreover, the Court explained that even if the FIRREA was not applicable in the present case this was not a case "in which judicial creation of a special federal rule would be justified." *Id.* at 87, 114 S. Ct. at 2055.[6]

In *Atherton*, the Resolution Trust Corporation (later replaced by the FDIC) sued several officers and directors of the failed City Federal Savings Bank claiming that they had violated the legal standard of care they owed that federally insured institution. *Id.*, 519 U.S. at 215, 117 S. Ct. at 668. The

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[6] The Court explained that the creation of federal common law was justified only in those limited situations where "there is a 'significant conflict between some federal policy or interest and the use of state law.'" *O'Melveny*, 512 U.S. at 87, 114 S. Ct. at 2054 (quoting *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68, 86 S. Ct. 1301, 1304, 16 L.Ed.2d 369 (1966)).

Supreme Court addressed the question of where courts should look to find the standard of care against which to measure the legal propriety of the defendants' conduct – to state law, to federal common law, or to a provision of the FIRREA, 12 U.S.C. § 1821(k). *Id.* at 215-216, 117 S. Ct. at 669. The district court had held that the federal statute, § 1821, provided the appropriate standard of care. *Id.* at 216, 117 S.Ct. at 669. The Court of Appeals for the Third Circuit reversed holding that the federal statute provided only a baseline level of care but did not prohibit actions resting upon stricter rules originating in either state law or in federal common law. *Id.* at 217, 117 S. Ct. at 669. The Supreme Court vacated the Third Circuit opinion. As an initial matter the Court held that the federal common law corporate governance standards articulated by the Court in *Briggs* v. *Spaulding*, 141 U.S. 132, 11 S. Ct. 924, 35 L. Ed. 662 (1891), did not survive the Court's later decision in *Erie R. Co.* v. *Tompkins*. *Id.*, at 226, 117 S. Ct. at 674. As a result, the Court made clear: "There is no federal common law that would create a general standard of care applicable to this case." *Id.* The Court then went on to consider whether federal statute, 12 U.S.C. § 1821, or state law provided the appropriate standard of care in the case. The Supreme Court held that the federal statute's "gross negligence" standard provided a floor, but did not stand in the way of a stricter state-law standard making directors and officers liable for less egregious conduct. *Id.* at 227, 117 S. Ct. at 674.

In *Motorcity I* and *Motorcity II* we ruled decisively and en banc that the Supreme Court's decisions in *O'Melveny* and *Atherton* did not abrogate our prior holdings regarding the continued viability of the *D'Oench, Duhme* doctrine. We explained that both *O'Melveny* and *Atherton* dealt with the question of whether to create new federal common law in particular areas rather than with the question of whether Congress intended the FIRREA to supplant "the previously established and long-standing federal common law *D'Oench* doc-

trine." *Motorcity II*, 120 F.3d at 1143; *see also Motorcity I*, 83 F.3d at 1330. In *Motorcity II*, our affirmation of the D'Oench, Duhme doctrine in light of the FIRREA and the Supreme Court's decisions in *O'Melveny* and *Atherton* was explicit:

> [W]e decline to accept *Motorcity's* invitation to overrule *D'Oench*. With the *D'Oench* doctrine safely in place as a long-standing federal common law rule, we conclude that the appropriate analysis for the statutory abrogation issue presented in this case is that articulated in *United States* v. *Texas*,[7] and not that articulated in *Atherton* and *O'Melveny*. We continue to believe that the analysis set forth in our prior en banc opinion reflects the most reasonable reading of Congress's intent – *i.e.*, that Congress did not intend FIRREA to displace the *D'Oench* doctrine, but rather intended to continue the harmonious, forty-year coexistence of the statute and the *D'Oench* doctrine.

Id., 120 F.3d 1140, 1144. This panel is bound by the Circuit's prior *en banc* decision. *See Chambers* v. *Thompson*, 150 F.3d 1324, 1326 (11th Cir.1998) (noting that "[w]e are bound to follow a prior panel or *en banc* holding, except where that holding has been overruled or undermined to the

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[7] In *United States* v. *Texas*, 507 U.S. 529, 113 S. Ct. 1631, 123 L. Ed.2d 245 (1993), the Supreme Court noted the "longstanding ... principle that '[s]tatutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'" *Id.* 507 U.S. at 534, 113 S. Ct. 1631 (quoting *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783, 72 S. Ct. 1011, 1014, 96 L. Ed. 1294 (1952)). The Court held that "[i]n order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *Id.* (citing *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625, 98 S. Ct. 2010, 2015, 56 L. Ed.2d 581 (1978); *Milwaukee* v. *Illinois*, 451 U.S. 304, 315, 101 S. Ct. 1784, 1791, 68 L. Ed.2d 114 (1981)).

point of abrogation by a subsequent *en banc* or Supreme Court decision").

Therefore, under the *D'Oench, Duhme* doctrine, Murphy has failed to state a claim against the FDIC because he has not alleged a written agreement between Southeast and Orchid establishing their joint venture relationship, the *D'Oench, Duhme* doctrine remains good law in this Circuit, and there is no sound reason not to apply the doctrine in this case. Accordingly, we affirm the district court's order dismissing Murphy's complaint.[8]

AFFIRMED.

[8] In view of this ruling, we need not address the district court's alternative grounds for dismissal.

APPENDIX B

829 F. Supp. 3

Bruce G. MURPHY, pro se, Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORP., as Receiver for Southeast Bank, Defendant.

Civ. A. No. 92-1924 (CRR).

United States District Court,

District of Columbia.

Aug. 10, 1993.

Bruce G. Murphy, pro se.

Brendan Collins, Atty., U.S. Dept. of Justice, Civil Div., Washington, DC, together with Stuart E. Schiffer, Acting Asst. Atty. Gen., J. Ramsey Johnson, U.S. Atty. District of Columbia, John O. Birch, Asst. U.S. Atty., and J. Christopher Kohn, and Robert M. Hollis, U.S. Dept. of Justice, Civil Div., Washington, DC, for defendant.

MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

The above-captioned case is before the Court on the Plaintiff's Motion for Summary Judgment on Counts I and II, the Defendant's Motion to Dismiss the entire action, and the Defendant's Motion to Stay Discovery Pending Resolution of its Motion to Dismiss. After careful review of the above motions, the oppositions and replies thereto, and the applicable law, the Court shall grant Summary Judgment for the Defendant.[1]

[1] Because the Defendant's Motion to Dismiss relies on matters outside the pleadings, the Court shall treat the Motion as one for Summary Judgment. *See* Fed.R.Civ.P. 12(c).

I. BACKGROUND

The Plaintiff, Bruce Murphy, was a limited partner in Orchid Island Associates Limited Partnership ("Orchid"), a real estate developer financed by Southeast Bank, N.A. ("Southeast"). Southeast loaned Orchid approximately $50 million between 1988 and 1990.

According to the Complaint, Orchid was the developer of the Orchid Island Golf and Beach Club project near Vero Beach, Florida ("the Project"). In 1989, the Plaintiff invested $515,672.37 to become a limited partner in Orchid. When sales revenues slowed, a plan was devised whereby Orchid would hold a public bond offering to raise funds. Orchid was to take a "bridge" loan from Southeast, and other Orchid principals would take additional loans from Southeast, to carry the project until the bond offering was complete. The proceeds from the bond offering were intended to repay the bridge loan and decrease Orchid's outstanding debt with Southeast. When the participants learned that the bond financing would result in a lien on the project superior to theirs, they rejected the bond offering and the deal fell through. Orchid's financial position subsequently worsened, and Southeast placed Orchid in default on its loans and foreclosed on the Orchid mortgages.

The Plaintiff contends that Southeast, by its actions in connection with the Project, was a partner with Orchid and exercised control over the Project and the actions of Orchid. The Plaintiff contends that Southeast's actions resulted in harm to the Plaintiff's financial interest in the Project. On September 19, 1991, Southeast was declared insolvent and subject to Federal Deposit Insurance Corporation ("FDIC") receivership. On December 16, 1991, the Plaintiff filed a proof of claim with the FDIC for $602,031.54, an amount comprised of the initial investment, expenses, and attorney fees. On June 23, 1992, the FDIC disallowed the Plaintiff's claim stating that the FDIC was not liable for any alleged damages. The FDIC declined to grant an administrative

hearing to review this determination. On August 20, 1992, the Plaintiff brought suit in this Court against the FDIC as receiver for Southeast. The Plaintiff's Complaint alleges breach of fiduciary duties, breach of contract, accounting deficiencies, fraud, negligent misrepresentation, and an unlawful offer to sell securities.

The FDIC has moved to dismiss Counts III through IX of the Plaintiff's Complaint pursuant to Fed.R.Civ.P. 12(b)(6), arguing that the doctrine of *D'Oench, Duhme & Company* v. *FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942), and 12 U.S.C. § 1823(e) bar these claims. More specifically, FDIC argues that the Plaintiff cannot sue Southeast under a joint venture theory, because all written documentation on the relationship between Orchid and Southeast explicitly rejects a joint venture relationship. The FDIC has also moved to dismiss the remaining Counts I and II, arguing that under 12 U.S.C. § 1821(d)(7)(A), the FDIC has discretion to determine when to establish administrative procedures to review claims, and that even if the FDIC is obligated to establish such procedures, they have discretion to determine which individual claimants are entitled to review. After careful review of the entire record in this action and the applicable law, the Court concludes that there are no material issues of fact in dispute that would preclude the entry of summary judgment for the Defendant.[2]

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[2] Summary judgment is awarded when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). It is well established that the Court must believe the non-movant's evidence and draw all justifiable inferences in his or her favor. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed.2d 202 (1986). A factual dispute must be material in order to preclude summary judgment; that is, it must be a dispute that may affect the outcome of the suit under the governing law. *Liberty Lobby*, 477 U.S. at 248, 106 S. Ct. at 2510.

II. THE COURT SHALL GRANT SUMMARY JUDGMENT FOR THE DEFENDANT ON COUNTS V THROUGH IX BECAUSE THE PLAINTIFF CANNOT RECOVER AGAINST THE FDIC UNDER AN ALLEGED UNWRITTEN JOINT VENTURE AGREEMENT PURSUANT TO *D'OENCH, DUHME & COMPANY* V. *FDIC*, 315 U.S. 447 (1942), AND 12 U.S.C. § 1823(e).

In Counts V through IX, the Plaintiff alleges breach of fiduciary duty, breach of contract, fraudulent omissions and representations, and negligent misrepresentations by Southeast. The Court concludes that Summary Judgment must be granted for the Defendant on these five claims because the Plaintiff cannot recover against Southeast on any theory of an alleged unwritten joint venture agreement pursuant to *D'Oench*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 and 12 U.S.C. § 1823(e).

The Plaintiff claims that Southeast and Orchid were partners in an unwritten joint venture agreement in connection with the Project. The crux of the Plaintiff's allegations is that Southeast acted in concert with Orchid in making decisions pertaining to the Orchid development that were separate and apart from Southeast's role as a mere lender to Orchid.[3]

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[3] For example, in Count V, the Plaintiff alleges that Southeast breached a fiduciary duty to the Plaintiff by failing to "exercise good faith, reasonable business judgment, and integrity in handling partnership affairs." Compl. at ¶ 40. In addition, in Count VI, the Plaintiff alleges that Orchid and Southeast were parties to an investment agreement with the Plaintiff in August, 1989, whereby the Plaintiff was to be paid an annual monetary sum. The Plaintiff further alleges breach of this contract by Southeast. *See* Compl. at ¶ 43. In Count VII, the Plaintiff alleges that Orchid breached its duty under the April 30, 1989 Accounting of the Second and Restated Limited Partnership, whereby Orchid was to furnish to each limited partner an annual audit report, a quarterly unaudited report, and an annual copy of the 1065 k-1 form. The Plaintiff seeks these documents for 1990 and 1991. However, this Count only refers to Orchid in connection with these reports and thus fails to state a claim against Southeast, and therefore the FDIC, for breach fiduciary duty to provide these reports to the Plaintiff.

Finally, in Count VIII and IX, the Plaintiff alleges that Southeast's failure to inform Orchid of the requirement that the participants approve the proposed bond offering constituted fraudulent omissions and representations and negligent misrepresentations. *See* Compl. at ¶ 47-50. The Plaintiff alleges that these omissions and representations induced Orchid to take an additional loan and expend other resources in anticipation of the bond offering.

However, such a claim is not cognizable under the law absent a written document. A party cannot rely on unrecorded agreements with a bank as the basis for claims or defenses against the FDIC. *D'Oench*, 315 U.S. 447, 62 S. Ct. 676; *Bowen* v. *FDIC*, 915 F.2d 1013 (5th Cir.1990); *see also Franklin Asaph Ltd.* v. *FDIC*, 794 F. Supp. 402 (D.D.C. 1992). Under *D'Oench*, transactions that do not appear on the bank's books are not cognizable in a court of law. *Bowen*, 915 F.2d at 1016. The policy underlying the *D'Oench* doctrine is "to protect [the FDIC], and the public funds which it administers, against misrepresentations as to the securities or other assets [and liabilities] in the portfolios of the banks which [the FDIC] insures." *D'Oench* 315 U.S. at 457, 62 S.Ct. at 679. While the original *D'Oench* case involved a party attempting to use an oral promise as a defense to a suit on a note issued by the FDIC, the modern *D'Oench* doctrine also applies when the FDIC is acting in its capacity as receiver, as is the case here. See *Bell & Murphy & Assoc., Inc.* v. *Interfirst Bank Gateway*, 894 F.2d 750, 753 (5th Cir.1990), *cert. denied*, 498 U.S. 895, 111 S. Ct. 244, 112 L.Ed.2d 203 (1990); *see also Bowen*, 915 F.2d at 1015.

In this case, there are no documents establishing the existence of a joint venture between Orchid and Southeast. Furthermore, the loan agreements here explicitly reject a joint venture between Southeast and Orchid. The first three loan agreements expressly provide that "[t]he Lender is a lender only and shall not be considered a shareholder, joint venturer

or partner of the Borrower."[4] Furthermore, the final loan agreement on March 21, 1991, states that:

> At no time did the Lender engage in or attempt to engage in or in any way involve itself in active management marketing, operation or control of the Project and has not, at any time, acted as a joint venturer in or a partner with the Debtor parties in connection with the Project. In the future, at no time shall Lender be construed as having acted as a joint venturer in or a partner with the Debtor Parties in connection with the Project.

See Defendant's Motion to Dismiss at 6 (emphasis added).

The Plaintiff argues that his claims should not be barred because *D'Oench* only applies to a borrower of the bank who is trying to avoid an obligation. *See* Plaintiff's Opp'n at 4-5. He further contends that the *D'Oench* doctrine does not apply to certain tort claims that do not appear on the books of a failed bank. *Id.* at 3. The Court disagrees. The *D'Oench* doctrine acts as a bar where the Plaintiff is an investor, as well as when the Plaintiff is a borrower. *See In re NBW Commercial Paper Litigation*, 826 F.Supp. 1448, 1461-62 (D.D.C.1992). This is consistent with the logic of *D'Oench* which bars claims by any parties who, unlike depositors, were capable of protecting themselves through written agreements. Id.

Furthermore, "[t]orts and other claims which center around an unrecorded agreement are also barred, even though the plaintiff is not asserting the agreement itself explicitly against the FDIC." *In re NBW Commercial Paper Litigation*, 826 F.Supp. at 1465; *see also, FDIC* v. *State Bank of Virden*, 893 F.2d 139 (7th Cir.1990); *but see*, *Astrup* v. *Midwest Fed. Sav. Bank*, 886 F.2d 1057, 1059-60 (8th Cir.1989). Thus, the claims here are exactly the type of claims which are barred by

[4] This language was contained in the August 30, 1988 loan agreement, the April 13, 1989 loan agreement, and the January 31, 1990 loan agreement.

D'Oench.

In addition, the plain language of § 1823(e) bars this kind of claim.[5] Section 1823(e) provides that:

> No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement--
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. § 1823(e) (1988) (emphasis added).

Thus, the Plaintiff's claims under the alleged joint venture theory are barred. Accordingly, the Court shall grant Summary Judgment on Counts V through IX for the Defendant.

III. THE COURT SHALL GRANT SUMMARY JUDGMENT FOR THE DEFENDANT ON THE SECURITIES LAW CLAIMS BECAUSE THE PLAINTIFF HAS NOT STATED ANY INDEPENDENT BASIS FOR

[5] This section is "essentially a codification of *D'Oench*." *Bowen*, 915 F.2d at 1015. Whether the bar of *D'Oench* and section 1823 is coextensive has been debated, *see In re NBW Commercial Paper Litigation*, 826 F.Supp. 1448 (D.D.C.1992) however, such an inquiry is not necessary in the instant case.

SOUTHEAST'S LIABILITY OTHER THAN AN ALLEGED UNWRITTEN AGREEMENT.

In Counts III and IV, the Plaintiff alleges securities law violations which he claims do not rely on a joint venture theory. In Count III the Plaintiff alleges that Orchid violated the registration requirement of the Virginia Securities Act § 13.1-507 by not registering the Orchid partnership units as securities. *See* Compl. at ¶ 35-36. Count IV alleges that the solicitation letter used by "[Orchid], the general partners, and [Southeast]" violated the "Unlawful Offers & Sales Provisions" of the Virginia Securities Act and the Florida Securities and Investor Protection Act. See Compl. at ¶ 38. Because the Plaintiff cannot point to any independent basis for liability against Southeast separate and apart from an alleged unwritten agreement, the Court shall also grant Summary Judgment for the Defendant on these claims.[6]

The Plaintiff argues that he can establish a degree of control by Southeast over the Project sufficient to satisfy § 13.1-522(B) even if he cannot establish the joint venture theory. *See* Plaintiff's Opp'n at 5-6. However, the Plaintiff cannot establish that Southeast was a "material participant" because, as set forth above, all of the written agreements between Orchid and Southeast explicitly reject the proposition that Southeast was anything more than simply a lender to Orchid. To the extent that the Plaintiff attempts to rely on an unwritten agreement to prove these securities violations claims, they are again barred by *D'Oench*. Courts have held

[6] In his Complaint, the Plaintiff does not even mention Southeast in the discussion of Count III, and thus on the face of the Complaint, the Plaintiff does not state any cause of action against Southeast. Not until his Opposition to the Defendant's Motion to Dismiss, does the Plaintiff allege that Southeast is also liable for this alleged violation under Va.Code Ann. § 13.1-522(B) which makes "material participants" in an unlawful sale also liable for any violations. However, even under the theory set forth in the Plaintiff's Opposition, this claim must fail because it is still barred by *D'Oench* and § 1823(e).

that *D'Oench* prohibits any claims based upon an unwritten agreement, even where the claims have been characterized as violations of securities laws. *See In re NBW Commercial Paper Litigation*, 826 F. Supp. at 1466-69; see also [sic] (citing *Kilpatrick v. Riddle*, 907 F.2d 1523, 1529 (5th Cir.1990), *cert. denied*, 498 U.S. 1083, 111 S. Ct. 954, 112 L. Ed.2d 1042 (1991)).[7] Accordingly, the Court shall grant Summary Judgment on Count III for the Defendant.

Even assuming arguendo, that the Plaintiff once had a cognizable securities law claim not arising under a joint venture theory, the Plaintiff's claims would still be barred under § 13.1-522(D) which provides that "[n]o suit shall be maintained to enforce any liability created under this section [including § 13.1-502 and § 13.1-507] unless brought within two years after the transaction upon which it is based." Here the Plaintiff invested in Orchid in August of 1989. *See* Compl. at ¶ 19. However, the Plaintiff did not file the current action until August 20, 1992. *See* Compl. at 1. Thus, the Plaintiff's securities claims are barred under the plain language of the Virginia statute.

IV. THE COURT SHALL GRANT SUMMARY JUDGMENT FOR THE DEFENDANT ON THE ADMINISTRATIVE CLAIMS BECAUSE, UNDER THE PLAIN LANGUAGE OF THE STATUTE, THE FDIC HAS DISCRETION IN DETERMINING WHETHER TO ESTABLISH PROCEDURES TO REVIEW CLAIMS.

The Plaintiff also seeks declaratory relief and mandamus alleging that the FDIC did not provide the Plaintiff with an

[7] A claim for securities violations against the FDIC is cognizable when the act being sued on has no connection to an unwritten agreement but rather involves an independent basis for liability. *See In re NBW Commercial Paper Litigation*, 826 F. Supp. at 1467-68 (Claim for an unlawful sale of securities in violation of the Securities Act of 1933 not barred by *D'Oench*). However, no such independent basis for liability exists in this case.

administrative hearing or other alternative dispute resolution procedure pursuant to 12 U.S.C. § 1821(d)(7)(A) or 12 U.S.C. § 1821(d)(7)(B) to review the denial his claim. The Court finds however, that the FDIC has discretion in determining whether to establish review procedures, and thus the Court shall grant Summary Judgment for the Defendant on these claims.

The plain language of section 1821(d)(4) provides that the FDIC "may prescribe regulations ... providing for administrative determination of claims and review of such determination." (emphasis added). More specifically, an administrative hearing may be provided "if any claimant requests review ... and the [FDIC] agrees to such request ...." 12 U.S.C. § 1821(d)(7)(A) (emphasis added). Finally, the FDIC may provide other review procedures "as may be appropriate." 12 U.S.C. § 1821(d)(7)(B)(i). These provisions grant the FDIC discretion in determining whether to establish procedures to review claims. Furthermore, courts interpreting these sections have held similarly. *See FDIC* v. *Hanson*, 799 F. Supp. 954, 958 (D.Minn.1992) (FDIC has no obligation under § 1821(d)(4) to establish administrative procedures for the review of its denial of a claim); *see also, Mansolillo* v. *FDIC*, 804 F. Supp. 426, 430 (D.R.I.1992). Finally, even assuming arguendo, that the FDIC was required to establish such procedures, the statute still provides the FDIC with discretion to determine which particular claimants are entitled to review. *See* § 1821(d)(7)(A). Thus, because the Plaintiff is not entitled to an administrative review of his claim, the Court shall grant Summary Judgment on Counts I and II for the Defendant.

V. CONCLUSION

For all the reasons stated above, the Court concludes that the Plaintiff's claims are barred by the doctrine of *D'Oench, Duhme & Company* v. *FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942), and 12 U.S.C. § 1823(e). Accordingly, the Court shall grant Summary Judgment for the Defendant.

Furthermore, the Court shall deny the Defendant's Motion to Stay Discovery Pending Resolution of its Motion to Dismiss as moot. The Court shall enter an Order of even date herewith in accordance with this Memorandum Opinion.

ORDER

Upon consideration of the Plaintiff's Motion for Summary Judgment, the Defendant's Motion to Dismiss, and the Defendant's Motion to Stay Discovery Pending Resolution of its Motion to Dismiss, the oppositions and replies thereto, the arguments of counsel, the record herein, the applicable law, and for the reasons articulated in this Court's Memorandum Opinion of even date herewith, it is, by the Court, this 10th day of August, 1993,

ORDERED that the Plaintiff's Partial Motion for Summary Judgment on Counts I and II shall be, and hereby is, DENIED; and it is

FURTHER ORDERED that the Defendant's Motion for Summary Judgment on Counts I through IX shall be, and hereby is, GRANTED; and it is

FURTHER ORDERED that the Defendant's Motion to Stay Discovery Pending Resolution of its Motion to Dismiss is DENIED as moot; and it is

FURTHER ORDERED that the above-captioned case shall be, and hereby is, DISMISSED from the dockets of this Court.

APPENDIX C

61 F.3d 34

Bruce G. MURPHY, Appellant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Southeast Bank, N.A., Appellee.

Nos. 93-5268, 93-5412.

United States Court of Appeals,

District of Columbia Circuit.

Argued April 7, 1995.

Decided Aug. 1, 1995.

Rehearing and Suggestion for Rehearing In Banc Denied Oct. 4, 1995.

Appeals from the United States District Court for the District of Columbia (No. 92cv01924).

Bruce G. Murphy, pro se, argued the cause and filed the briefs as appellant.

John P. Parker, Sr. Atty., F.D.I.C., Washington, DC, argued the cause, for appellee. With him on the brief was Ann S. DuRoss, Asst. Gen. Counsel, and Colleen J. Bombardier, Sr. Counsel, F.D.I.C., Washington, DC. Claire L. McGuire and David A. Felt, Attys., F.D.I.C., Washington, DC, entered appearances.

Before: EDWARDS, Chief Judge; WALD and GINSBURG, Circuit Judges.

Opinion for the Court filed by Circuit Judge GINSBURG.

GINSBURG, Circuit Judge:

Bruce Murphy, an investor in an unsuccessful real estate venture, seeks damages from the FDIC on the theory that the

failed bank that financed the venture, of which the FDIC is the receiver, was responsible for his loss. The district court granted summary judgment in favor of the FDIC upon the ground that the appellant's claims are barred both by federal common law, *see D'Oench, Duhme & Co., Inc.* v. *FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942), and by 12 U.S.C. § 1823(e). We hold that (1) § 1823(e) does not bar Murphy's claims because the FDIC has not demonstrated, as required by that statute, that the FDIC's interest in a specific asset would be diminished if the claims were upheld; and (2) the Supreme Court's recent decision in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 114 S. Ct. 2048, 129 L. Ed.2d 67 (1994), removes the federal common law *D'Oench* doctrine as a separate bar to such claims. We therefore reverse the district court and remand the case for further proceedings.

I. BACKGROUND

In his complaint Murphy tells the following story (which we take as true for the purpose of this appeal). In 1989 he paid approximately $515,000 for one "partnership unit" in the Orchid Island Associates Limited Partnership, which was then in the process of developing the Orchid Island Golf and Beach Club near Vero Beach, Florida. The investment contract guaranteed that he would receive a "6.1 multiple return on investment" but to date he has received nothing.

Southeast Bank, N.A. was the lead lender for the Orchid Island project. In the late 1980's and early 1990's the bank made several loans to the partnership, in a total amount approximating $50 million. Southeast was also involved in a plan whereby Orchid would engage in a public bond offering to raise additional funds in order to complete the project. Pursuant to that plan, Orchid would take a "bridge loan" from Southeast to cover expenses until the bonds were sold, and the proceeds from the bond offering would be used both to repay the bridge loan and to reduce the amounts outstanding on Southeast's earlier loans. When Southeast informed Orchid's other lenders that the proposed bond financing would

result in a lien on the project superior to theirs, however, they rejected the proposal and the deal fell through. Orchid subsequently defaulted on its loan obligations, and Southeast foreclosed upon the property. Shortly thereafter Southeast was itself declared insolvent, the FDIC was appointed receiver of the bank, and Murphy filed this lawsuit.

Although somewhat vague, the gravamen of Murphy's claim is that the bank effectively controlled Orchid and thus assumed the role, and the corresponding legal duties, of a joint venturer or partner. Murphy contends that the bank is therefore responsible for various misdeeds allegedly committed by Orchid officials, including: "failure to register securities" (count 3); "unlawful offer and sale of securities" (count 4); "breach of fiduciary duties" (count 5); "breach of contract" (count 6); and "accounting" improprieties (count 7). Murphy further contends that, in its role as promoter of the aborted bond offering, the bank itself engaged in "fraud" (count 8) and made "negligent misrepresentation[s]" (count 9). In addition, Murphy complains that the FDIC has failed to establish alternative dispute resolution (ADR) procedures, as required by statute, and therefore has improperly denied him the opportunity to pursue his claim through an ADR channel (counts 1 and 2). Murphy seeks money damages (in counts 3-6 and 8-9), and an order requiring the FDIC to give him certain accounting statements (count 7) and to adopt ADR procedures and apply them to his claim (counts 1-2).

Each of the loan agreements between Orchid and the bank contains a provision to the following effect: "The Lender is a lender only and shall not be considered a shareholder, joint venturer or partner of the Borrower." Relying upon those written provisions, Murphy's inability to point to any written agreement that supports his joint-venture theory of liability, the federal common law *D'Oench* doctrine, and 12 U.S.C. § 1823(e), the district court granted summary judgment in favor of the FDIC on counts 3 through 9. The district court also granted summary judgment in favor of the FDIC on the first

two counts, holding that, under the governing statute, the FDIC has the discretion to decide whether to adopt an ADR procedure and, if it does so, whether a particular claim is suitable therefor.

II. ANALYSIS

Murphy raises distinct substantive and procedural points before this court. First, he argues that 12 U.S.C. § 1823(e) does not apply to his substantive claims and that the recent Supreme Court decision in *O'Melveny & Myers* v. *FDIC* makes clear that the federal common law *D'Oench* doctrine has been displaced by a federal statute. Second, he renews his claim that the FDIC is required to establish an ADR procedure and to apply it to his claim.

A. 12 U.S.C. § 1823(e)

In 1950, eight years after the Supreme Court decided *D'Oench*, the Congress enacted the Federal Deposit Insurance Act, 12 U.S.C. § 1811 et seq., which "bars anyone from asserting against the FDIC any agreement not properly recorded in the records of the bank that would diminish the value of an asset held by the FDIC." *E.I. du Pont de Nemours & Co.* v. *FDIC*, 32 F.3d 592, 596 (D.C.Cir.1994). That provision, as modified in 1989 by the Financial Institutions Reform, Recovery, and Enforcement Act, Pub.L. No. 101-73, 103 Stat. 183 (better known as the FIRREA), currently provides that:

> No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement--
>
> (A) is in writing,
>
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(D) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C.§ 1823(e)(1). The Congress further provided in the FIRREA that "any agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the [FDIC]." 12 U.S.C. § 1821(d)(9)(A).

By their terms, these statutory provisions bar any claim that (1) is based upon an agreement that is either (a) unwritten or (b) if in writing, does not meet the stringent requirements of §§ 1823(e)(1)(B)-(D), and (2) would diminish or defeat the interest of the FDIC in an asset acquired by it in its capacity as receiver of a failed depository institution. Murphy concedes that his claims (save one) are (1) premised upon the existence of an unwritten joint-venture agreement between the bank and Orchid, but argues that § 1823(e) does not bar his claims because (2) the FDIC has failed to demonstrate that its interest in any specific asset assigned from Southeast would be diminished were he to prevail. He points out that he is not a borrower (or "obligor" per the statute) attempting to avoid payment of a loan owed to Southeast Bank but is rather an investor in a failed business venture in which, he claims, the failed bank was a culpable participant. To be sure, Murphy's claims, if successful, would diminish the value of the bank in the hands of the FDIC but that, according to Murphy, is not sufficient to meet the "asset" requirement of § 1823(e). We agree.

We recently held that § 1823(e)(1) is "applicable only to cases involving a specific asset, usually a loan, which in the ordinary course of business would be recorded and approved by the bank's loan committee or board of directors" and that

"the requirements of § 1823(e) effectively limit that provision to conventional loan transactions." *du Pont*, 32 F.3d at 597. That interpretation gains support from subsection (C) of § 1823(e)(1), which specifically requires that, if a suit is to go forward, the agreement upon which it is based must have been approved by "the board of directors of [the bank] or its loan committee." *See In Re NBW Commercial Paper Litigation*, 826 F. Supp. 1448, 1463-64 (D.D.C.1992) (§ 1823(e) applies primarily to loan transactions). An agreement that does not involve an extension of credit would not ordinarily be submitted to the board or to a loan committee for approval. Moreover, while any agreement to make a significant loan will ordinarily meet the exacting requirements of § 1823(e), see *Langley* v. *FDIC*, 484 U.S. 86, 92, 108 S. Ct. 396, 401, 98 L. Ed.2d 340 (1987) (requirements of § 1823(e) "ensure mature consideration of unusual loan transactions by senior bank officials"), those requirements will almost never be met by an agreement between the bank and an investor, a trade creditor, or most clearly, a tort claimant (such as Murphy is, at bottom). Without so much as a "hint in any of Congress' pronouncements that such individuals should be disfavored," *du Pont*, 32 F.3d at 597 (quoting *NBW*, 826 F. Supp. at 1463), it would be positively wanton for a court to construe the asset requirement so broadly as to destroy their otherwise valid claims.

Even if we assume for the sake of argument that the asset requirement of § 1823(e) is so undemanding that § 1823(e) is a defense to any claim that would diminish the FDIC's interest in any asset that it has acquired from a failed bank, including an asset other than a loan, Murphy's claims would still survive. The FDIC does not point to an interest in any specific asset of any type that would be diminished by Murphy's claims. Indeed, the FDIC does not even respond directly to Murphy's assertion that its interest in no specific asset would be diminished, preferring instead to argue only that other courts have applied the federal common law *D'Oench*

doctrine to bar claims that would not diminish its interest in a specific asset. That response not only fails to speak to the proper interpretation of the asset requirement of § 1823(e), it amounts to a near concession that the statute does not bar Murphy's claims and that if the FDIC is to find any refuge it must be in federal common law.

In a footnote to its brief the FDIC does observe that its "recovery from the loan transactions would clearly be diminished by any liabilities arising out of the same transactions." That statement could charitably be read implicitly to argue that the loans that Southeast made to Orchid are the specific assets in which the FDIC's interest would be diminished by Murphy's claims. If that is the FDIC's argument, however, then we find it singularly unconvincing. The value of the loans themselves would be diminished not at all by Murphy's claims. The FDIC may collect those loans or execute upon the property securing them to the same extent regardless whether Murphy prevails upon his damage claims. Only the overall value of the bankrupt's estate, not the receiver's interest in any specific asset, would be diminished if Murphy were to prevail.

Because the FDIC has failed to demonstrate that any specific asset – let alone a specific asset "which in the ordinary course of business would be recorded and approved by the bank's loan committee or board of directors," *du Pont*, 32 F.3d at 597--would be diminished were Murphy to succeed, we reverse the judgment of the district court (which did not discuss the specific asset requirement in holding that § 1823(e) bars Murphy's claims). Although the FDIC does not rely separately upon § 1821(d)(9)(A), the statutory cousin of § 1823(e), we note also that that section simply "incorporates by reference the requirements of § 1823(e)," including the asset requirement, *du Pont*, 32 F.3d at 597, and therefore can not provide an independent ground for judgment in favor of the FDIC.

B. Federal common law: herein of *D'Oench, Duhme & Co.*

The *D'Oench* case involved a securities dealer who had sold certain bonds to a bank insured by the FDIC. The issuer later defaulted on the bonds. In order to allow the bank to avoid carrying past due bonds on its books, the securities dealer executed unconditional notes in the amount of the bonds, pursuant (the dealer alleged) to a secret side agreement that the bank would not call the notes for payment. When the bank failed, however, the FDIC was appointed receiver and it demanded payment of the notes. The Supreme Court held that to allow the securities dealer to rely upon the secret agreement as a defense to payment of its note would violate the policy behind the Federal Reserve Act, *viz.* "to protect [the FDIC], and the public funds which it administers, against misrepresentations as to the securities or other assets in the portfolios of the banks which [the FDIC] insures." 315 U.S. at 457, 62 S. Ct. at 679.

Thus was born the federal common law doctrine that courts have since expanded "beyond the paradigm in which a debtor seeks to assert a defense to liability on a note held by the FDIC" to bar a variety of both claims made and affirmative defenses raised against the FDIC as receiver. *See du Pont*, 32 F.3d at 597-99 (and cases cited therein). Indeed, in the instant case the district court held that the *D'Oench* doctrine extends to (and therefore bars) Murphy's substantive claim that the bank by its actions assumed the liabilities of a joint-venturer because that theory of liability contradicts the written agreements between the bank and Orchid in the records of the bank.

Although various circuits, including this one, have had occasion to apply the common law *D'Oench* doctrine since the passage of the FIRREA in 1989, Murphy argues that the Supreme Court's recent decision in *O'Melveny & Myers* now makes clear that the common law doctrine was preempted by that statute. To be sure, in *O'Melveny & Myers* the Supreme Court does not flatly state that *D'Oench* has been preempted

by the FIRREA, but it does set forth some more general propositions that, we think, lead ineluctably to that conclusion.

In *O'Melveny & Myers* the FDIC, as receiver of a California savings bank, sued a law firm that had performed services for the bank; it claimed that the firm had been negligent and had breached its fiduciary duty by failing to uncover the wrongdoing of certain officers of the bank. 512 U.S. at ----, 114 S. Ct. at 2052. The district court entered summary judgment in favor of the law firm, apparently upon the ground that under California law knowledge of the employees' misconduct is imputed to the employer – and thence to the FDIC as receiver in the employer's stead. *Id.* The FDIC argued that the question whether to impute knowledge of a bank employee's conduct to the FDIC is governed not by California law but by federal common law. *Id.* The Supreme Court unanimously rejected that contention, holding that the FIRREA preempted the creation of federal common law on this issue and that the rule of decision is therefore to be found either in the federal statute itself or in state law. *Id.* at ---, 114 S. Ct. at 2054.

The Court began its discussion of preemption with the proposition that it "would [not] adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *Id.* The Court then turned to 12 U.S.C. § 1821(d)(2)(A)(i), which, as amended by the FIRREA, provides that the FDIC "shall ... by operation of law, succeed to all rights, titles, powers, and privileges of the insured depository institution," and explained that this provision "appears to indicate that the FDIC as receiver steps into the shoes of the failed S & L [so that] any defense good against the original party is good against the receiver." *Id.*

The Court went on to hold that the above-quoted provision is an exclusive grant of rights to the FDIC as receiver,

which can be neither "supplemented [nor] modified by federal common law." *Id.* Here the Court cited four provisions of the FIRREA--including § 1821(d)(9), which it described parenthetically as "excluding certain state-law claims against FDIC based on oral agreements by the S & L" – that "specifically create special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver.... *Inclusio unius, exclusio alterius*." *Id.* The Court concluded this aspect of the opinion with the broad observation:

> It is hard to avoid the conclusion that § 1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent S & L, to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise. To create additional "federal common-law" exceptions is not to "supplement" this scheme, but to alter it.

Id.

Although the Court's reasoning appears to leave no room for a federal common law *D'Oench* doctrine, the FDIC here emphasizes that the continuing vitality of *D'Oench* was not directly before the Supreme Court and that the Court did not specifically mention *D'Oench* in its opinion. That is hardly compelling, however, when one considers that "[i]n cases of doubt, the institutional role of the Supreme Court weighs in favor of considering its rulings to be general rather than limited to the particular facts." *Cowin* v. *Bresler*, 741 F.2d 410, 425 (D.C.Cir.1984). That point has particular force in this instance, for while the vitality of *D'Oench* was not directly at issue in *O'Melveny & Myers* the Court was specifically advised by both sides on brief and at oral argument that resolution of the issue before it could also affect the *D'Oench* doctrine. Moreover, although the opinion for the Court does not specifically mention *D'Oench*, it does expressly include one of the *D'Oench*-like statutory provisions (§ 1821(d)(9)) in the list of special federal statutory rules of decision from which it infers that "*[i]nclusio unius, exclusio alterius*." *O'Melveny &*

Myers, 512 U.S. at ----, 114 S. Ct. at 2054. In so doing the Supreme Court, we think, necessarily decided the *D'Oench* question. To translate: the inclusion of § 1821(d)(9) in the FIRREA implies the exclusion of overlapping federal common law defenses not specifically mentioned in the statute – of which the *D'Oench* doctrine is one.

The FDIC next contends that this interpretation is inconsistent with both the Supreme Court's earlier decision in *Langley* v. *FDIC*, 484 U.S. 86, 108 S. Ct. 396, 98 L. Ed.2d 340 (1987), and the decisions of several lower courts (including this one) holding that *D'Oench* survives the enactment of the FIRREA. The FDIC suggests that in *Langley* the Court signalled the continuing validity of the *D'Oench* doctrine because it relied upon the *D'Oench* case itself to inform its interpretation of the term "agreement" in § 1823(e). Even if we accepted that interpretation of *Langley*, however, it would surely not dispose of the present issue because the Court decided *Langley* before the Congress enacted the FIRREA. In any event, in *Langley* itself the Court suggested, if anything, that *D'Oench* was even then a dead letter:

> That "agreement" in § 1823(e) covers more than promises to perform acts in the future is confirmed by examination of the leading case in the area prior to the enactment of § 1823(e) in 1950 ... *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942)....

Id. at 92, 108 S. Ct. at 401. Referring to *D'Oench* as the leading case "prior to the enactment of § 1823(e) in 1950" implies that *D'Oench* had lost its vitality as federal common law with the enactment of the FDIA in 1950. At most the Court in *Langley* left that question open.

As for the post-FIRREA decisions of the lower courts, the FDIC is undeniably correct in its assertion that many courts, including we, have either explicitly stated or implicitly assumed that the federal common law remains alive and well

alongside its statutory cousin. *See, e.g. du Pont*, 32 F.3d at 596-97; *NBW*, 826 F. Supp. at 1457-61 (and cases cited therein). Most courts, however, have done so "without even considering the preemption question." *NBW*, 826 F. Supp. at 1458. More specifically, not one court has discussed the impact of last year's decision in *O'Melveny & Myers* upon the continuing vitality of *D'Oench*. As the FDIC notes, our own *du Pont* opinion issued after *O'Melveny & Myers*; but it was briefed and argued before the Supreme Court decision issued, and no party in *du Pont* brought the pendency of the issue in *O'Melveny & Myers* to the attention of the court. We can therefore state with confidence that this court has not heretofore decided what impact *O'Melveny & Myers* has upon the *D'Oench* doctrine.

Finally, as a fallback the FDIC characterizes the *O'Melveny & Myers* opinion as a prohibition only upon "the creation of new federal common law," thus suggesting that the Supreme Court decision does not reach the question whether already extant federal common law was preempted by the enactment of the FIRREA. That interpretation is not literally inconsistent with anything the Supreme Court says in *O'Melveny & Myers*: The federal common law rule at issue in that case appears to have been newly announced by the court of appeals post-FIRREA, and at one point the Court framed the issue before it as whether to "adopt a court-made rule to supplement federal statutory regulation." 512 U.S. at ----, 114 S. Ct. at 2054.

The problem with such a narrow focus upon *O'Melveny & Myers* is that it excludes from view all that the Supreme Court has said before about the impact of comprehensive new legislation upon existing federal common law. Although federal common law is sometimes a "necessary expedient," *Milwaukee* v. *Illinois*, 451 U.S. 304, 314-15, 101 S. Ct. 1784, 1791-92, 68 L.Ed.2d 114 (1981), the Court has made clear that

> when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of law-making by federal courts disappears.... [The Court's] commitment to the separation of powers is too fundamental to continue to rely on federal common law ... when Congress has addressed the problem.

By stating that "§ 1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent S & L, to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise," *O'Melveny & Myers*, 512 U.S. at ----, 114 S. Ct. at 2054, the Supreme Court appears to have concluded that the Congress in the FIRREA did indeed address the question previously governed by *D'Oench*. It follows that the need for a body of federal common law under the rubric of *D'Oench* has now "disappeared" and that the district court erred in holding that Murphy's claims are barred under *D'Oench*.

C. The procedural claims

In count 1 of his complaint Murphy seeks a declaratory judgment that the FDIC is required by statute to establish an ADR procedure and to offer Murphy the option of resolving his claim through that procedure; in count 2, he seeks a writ of mandamus compelling that result. The district court granted summary judgment in favor of the FDIC on both counts.

The FIRREA does seem to require the FDIC either to establish an ADR process or to explain why such a process is not appropriate for resolving any claims. 12 U.S.C. § 1821(d)(7)(B)(i) ("The [FDIC] shall also establish such alternative dispute resolution processes as may be appropriate for the resolution of claims"). The FDIC appears, however, to have initiated an ADR program since Murphy raised his dispute with the agency. *See* Resolution of the Board of Directors of the FDIC Concerning the Implementation of ADR

(Dec. 20, 1994). Therefore, Murphy's request that we order the FDIC to take that step appears to be moot.

As for Murphy's request for an order compelling the FDIC to direct his case to an ADR process, we see that the statute gives the agency the discretion to decide whether to refer any particular case to ADR. 12 U.S.C. § 1821(d)(7)(B)(iii) ("all parties, including ... the [FDIC], must agree to the use of [an ADR] process in a particular case"). Consequently, we decline Murphy's invitation to compel such action.

III. CONCLUSION

For the foregoing reasons, we affirm the district court's grant of summary judgment in favor of the FDIC on counts 1 and 2 and reverse the district court's grant of summary judgment on counts 3 through 9. The latter claims are remanded to the district court for further proceedings consistent with this opinion.

So ordered.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE G. MURPHY,

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendant.

Civil Action No. 92-01924 (CRR)

FILED

Aug 21 1996

Nancy Mayer-Whittington, Clerk
U.S. DISTRICT COURT

ORDER

On August 7, 1996, the parties appeared before the Court, by telephone, for a status conference in the above-captioned litigation. At that time, the Court held a colloquy with the parties regarding the location of the plaintiff and the witnesses, as well as the prior location of the depository institution, Southeast Bank, N.A. The plaintiff and the vast majority of the fact witnesses reside in the Southern District of Florida. The failed real estate development that is the subject of this dispute is located in the Southern District of Florida. Prior to its failure, Southeast Bank, N.A. was located in Miami. Additionally, the plaintiff asserts a number of Florida state law claims in his Amended Complaint. After hearing argument from the parties concerning the transfer of this case to the United States District Court for the Southern District of Florida, the Court determined that in the interest of justice and for the convenience of the parties and witnesses, the Court shall

transfer this case to the Southern District of Florida. Accordingly it is, by the Court, this 20th day of August, 1996,

ORDERED that the above-captioned case shall be transferred to the United States District Court for the Southern District of Florida, pursuant to 28 U.S.C. § 1404(a), where venue is appropriate pursuant to 12 U.S.C. § 1821(d)(6)(A).

/S/

CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 96-2614-CIV-MOORE
Magistrate Judge Turnoff

BRUCE G. MURPHY,
Plaintiff,
v.
FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for Southeast Bank, N.A.,
Defendant.

ORDER

FILED BY [SR] D.C.
May 11 1998
CARLOS JUENKE
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

THIS CAUSE comes before the Court upon Defendant FEDERAL DEPOSIT INSURANCE CORPORATION's ("FDIC") Motion to Substitute Party Defendant, filed May 7, 1998. After due consideration, it is hereby:

ORDERED that Defendant's Motion is GRANTED, and that Jeffrey H. Beck, as Successor Agent for Southeast Bank, N.A. ("SEBNA"), is substituted as the party defendant in this lawsuit, in the place and stead of the FDIC, which was previously the Receiver of SEBNA.

Done and Ordered, in chambers, Miami, Florida, this 11th day of May, 1998.

/S/

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

APPENDIX F

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

Case No. 96-2614-CIV-MOORE

BRUCE G. MURPHY,

Plaintiff,

vs.

ORDER

FILED BY [AM] D.C.
JUL 27 1998
CARLOS JUENKE
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

JEFFREY H. BECK, as Successor Agent for the Federal Deposit Insurance Corporation as Receiver for Southeast Bank, N.A.,

Defendant.
_____/

THIS CAUSE came before the Court upon Defendant"s Motion to Dismiss (filed June 14, 1996 in United States District Court for the District of Columbia).

UPON CONSIDERATION of the motion, responses, the pertinent portions of the record, and being otherwise fully advised in the premises, the Court enters the following Order.

BACKGROUND

In August 1989, Plaintiff Bruce Murphy ("Murphy") invested $515,672.37 to purchase a limited partnership interest in Orchid Island Associates Limited Partnership ("Orchid").

Orchid was formed to develop the Orchid Island Golf and Beach Club Project (the "Project") for which Southeast Bank ("Southeast") was the lender. Pursuant to various loan agreements, Southeast loaned Orchid approximately $50 million dollars between 1988 and 1991. Orchid eventually defaulted on its loans and Southeast foreclosed on the property. Southeast itself was declared insolvent on September 19, 1991 and placed in Federal Deposit Insurance Corporation ("FDIC") receivership. On May 11, 1998, this Court permitted Jeffrey Beck ("Beck"), as Successor Agent to the FDIC as Receiver for Southeast to be substituted as the party defendant in this action.

In this action, Murphy alleges that Southeast, by its actions in connection with the Project, was a joint venturer or de facto partner with Orchid and that Southeast controlled the project. Murphy alleges that Southeast's actions caused the loss of his investment. Murphy filed this action in August 1992 before the United States District Court for the District of Columbia alleging breach of fiduciary duty, breach of contract, accounting deficiencies, fraud, negligent misrepresentation and securities violations. The FDIC moved to dismiss the complaint on the grounds that Murphy's claims were barred by the doctrine of D'Oench, Duhme & Company v. FDIC, 315 U.S. 447 (1942), and, more specifically, that Murphy could not sue Southeast under a joint venture theory because all written documentation on the relationship between Orchid and Southeast explicitly rejected a joint venture relationship. On August 10, 1993, the United States District Court for the District of Columbia granted the FDIC's Motion to Dismiss. Murphy v. FDIC, 829 F. Supp. 3 (D.D.C. 1993). Citing the D'Oench doctrine, the court held that Murphy could not assert a claim against the FDIC based on the theory that Southeast was a joint venturer in the Project because there was no written joint venture agreement. On appeal, the Court of Appeals for the D.C. Circuit reversed the majority of the district court's decision, holding that the D'Oench doctrine

was inapplicable. Murphy v. FDIC, 63 F.3d 34 (D.C. Cir. 1995).

On May 29, 1996, subsequent to the D.C. Circuit's decision, Murphy filed an Amended Complaint seeking declaratory relief (Count I), mandamus (Count II)[1] and alleging a failure to register securities (Count III), unlawful offer and sale of securities (Count IV), breach of fiduciary duty (Count V), breach of contract (Count VI), accounting irregularities (Count VII), fraud (Count VIII), RICO violations (Count IX), negligent misrepresentation (Count X) and negligence (Count XI).[2] Beck once again moves to dismiss the entire complaint, arguing the loan documents explicitly refute the existence of a joint venture agreement, or in the alternative, on various substantive grounds.

DISCUSSION

I. Motion to Dismiss Standard

A motion to dismiss for failure to state a claim merely tests the sufficiency of the complaint; it does not decide the merits of the case. Milburn v. United States, 734 F.2d 762, 765 (11th Cir. 1984). On a motion to dismiss, the Court notes that it must construe the complaint in the light most favorable to the plaintiff and accept the factual allegations as true. SEC v. ESM Group, Inc., 835 F.2d 270, 272 (11th Cir. 1988), cert. denied sub nom. Peat Marwick Main & Co. v. Tew, 486 U.S. 1055 (1988). A court should not grant a motion to dismiss "unless it appears beyond doubt that the plaintiff can prove no

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[1] FDIC was granted summary judgment on Counts I and II and thus these Counts are no longer before this Court. Murphy. FDIC, 61 F.3d 34 (D.C. Cir. 1995).

[2] By Order dated August 20, 1996, United States District Judge Charles R. Richey transferred this case to the Southern District of Florida. Judge Richey found that the plaintiff and vast majority of witnesses resided in this district. In addition, the failed land project is located in this district and Southeast Bank was originally located in Miami. Upon transfer, the case was assigned to this Court.

set of facts in support of his claim which would entitle him to relief." Conley v. Gibson. 355 U.S. 41, 45-46 (1957) (citations omitted); South Florida Water Management Dist. v. Montaivo, 84 F.3d 402, 406 (11th Cir. 1996). Nonetheless, to withstand a motion to dismiss, it is axiomatic that the complaint must allege facts sufficiently setting forth the essential elements of a cause of action.

II. Existence of a Joint Venture

Beck argues that because the alleged joint venture between Southeast and Orchid is evidenced by actions taken by Southeast, rather than by any written joint venture agreement, this action should be dismissed because the loan documents expressly disclaim the existence a joint venture. In this case, there are no documents creating a joint venture between Southeast and Orchid. Furthermore, the loan agreements at issue in this case expressly reject a joint venture between Southeast and Orchid. The first three loan agreements, dated August 30, 1998, April 13, 1989 and January 31, 1990, explicitly provide that "[t]he Lender [Southeast] is a lender only and shall not be considered a shareholder, joint venturer or partner of the Borrower [Orchid]." In addition, the final loan agreement, dated March 21, 1991, states:

> At no time did the Lender engage in or attempt to engage in or in any way involve itself in active management marketing, operation or control of the Project and has not, at any time, acted as a joint venturer in or a partner with the Debtor parties in connection with the Project. In the future, at no time shall Lender be construed as having, acted as a joint venturer in or a partner with the Debtor Parties in connection with the Project (emphasis added).

The plain language of the agreements is clear: No joint venture existed between Southeast and Orchid. See also FDIC v. Key Biscayne Develop. Assoc., 858 F.2d 670 (11th Cir. 1988) (observing that construction of a contract is a matter for the court to decide and expressly finding that agreements containing the language "It is understood and agreed that [Continental]. . . by issuing this loan or by taking any action pursuant hereto shall not be deemed a partner or joint venturer . . ." was clear evidence that the loan agreements did not create a joint venture).

Murphy does not dispute that the agreements contain express disclaimer language. Murphy argues, however, that he was not a party to any of the agreements containing the disclaimers and that "Florida law clearly permits a third party such as Murphy to establish the existence of a joint venture or de facto partnership relationship notwithstanding a purported disclaimer of a joint venture between the alleged joint venturers." Murphy's argument is flawed for two reasons: First, Murphy is not a third party who was "not a party to the disclaimer agreement." Murphy, by virtue of his investment, was a limited partner in Orchid. Orchid is the signatory on each of the loan documents. Thus, as a limited partner in Orchid, Murphy is a party to, and bound by, the agreements. In addition, even were Murphy correct in arguing he was not a party to the agreements, there is still no evidence of a joint venture. Under Florida law, courts generally look at five elements to determine whether a joint venture exists: (1) community of interest in the performance of a common purpose; (2) joint control or right of control; (3) joint proprietary interest in the subject matter; (4) right to share in the profits; and (5) a duty to share in the losses. Kislak v. Kreedian, 95 So. 2d 510 (Fla. 1957). A review of the loan agreements in this case fails to establish the existence of a joint venture, particularly because there is no evidence that Southeast had a right to share in any profits or any duty to share in any losses.

The Court further notes that the D'Oench doctrine prevents Murphy from stating a claim. As recognized by the United States District Court for the District of Columbia in ruling on the original motion to dismiss, Murphy's claim "is not cognizable under the law absent a written document . . .

and transactions that do not appear on the bank's books are not cognizable in a court of law." Murphy, 829 F. Supp. at 5-6. The District of Columbia Court of Appeals reversed, citing the Supreme Court decision in O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994) and expressly stating that the federal common law D'Oench doctrine has been displaced by federal statute. Murphy, 61 F. 3d at 36. In direct contrast to the D.C. Circuit, however, the Eleventh Circuit still adheres to the D'Oench doctrine. In Motorcity of Jacksonville Ltd. v. Southeast Bank, 83 F.3d 1317 (11th Cir. 1996), the Eleventh Circuit specifically "disagree[d] with Murphy's reliance on O'Melveny" and held that the federal common law D'Oench doctrine was not preempted. Id. at 1333-34. Accordingly, because the D'Oench doctrine is still valid in this circuit, the Court finds the district court's reasoning in Murphy persuasive that, in addition to the reasons stated above, the D'Oench doctrine prevents Murphy from stating a valid claim.

CONCLUSION

Based on the foregoing, it is ORDERED AND ADJUDGED that Beck's Motion to Dismiss is GRANTED. The Clerk of Court shall mark this case CLOSED. All motions not otherwise ruled upon are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 24th day of July, 1998.

/S/

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

cc: Hilare Bass, Esq.
John F. Bloss, Esq.

APPENDIX G

UNITED STATES CODE ANNOTATED
TITLE 12. BANKS AND BANKING
CHAPTER 16--FEDERAL DEPOSIT INSURANCE CORPORATION
[EXCERPT]

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Current through P.L. 106-180, approved 3-17-2000

§ 1823. Corporation monies

* * * *

(e) Agreements against interests of Corporation

(1) In general

No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement--

(A) is in writing,

(B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(D) has been, continuously, from the time of its execution, an official record of the depository institution.

(2) Public deposits

An agreement to provide for the lawful collateralization of deposits of a Federal, State, or local governmental entity or of any depositor referred to in section 1821(a)(2) of this title shall not be deemed to be invalid pursuant to paragraph (1)(B) solely because such agreement was not executed contemporaneously with the acquisition of the collateral or with any changes in the collateral made in accordance with such agreement.

* * * *

APPENDIX H

UNITED STATES CODE ANNOTATED
TITLE 12. BANKS AND BANKING
CHAPTER 16--FEDERAL DEPOSIT INSURANCE CORPORATION
[EXCERPT]

* * * *

(d) Powers and duties of Corporation as conservator or receiver

* * * *

(9) Agreement as basis of claim

(A) Requirements

Except as provided in subparagraph (B), any agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the receiver or the Corporation.

(B) Exception to contemporaneous execution requirement

Notwithstanding section 1823(e)(2) of this title, any agreement relating to an extension of credit between a Federal home loan bank or Federal Reserve bank and any insured depository institution which was executed before the extension of credit by such bank to such institution shall be treated as having been executed contemporaneously with such extension of credit for purposes of subparagraph (A).

* * * *